SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~378~~. 103

B. W. MOWER, PLAINTIFF IN ERROR,

vs.

NATHAN FLETCHER AND JOHN D. BICKNELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript on appeal	2	1
Complaint	2	1
Answer	4	2
Findings of fact	7	3
Conclusions of law	8	3
Additional findings	9	4
Judgment	14	6
Statement on motion for new trial	15	6
Patent from State of California to E. W. Squires, Oct. 20, 1875	16	7
Testimony of E. W. Squires	19	8
J. K. Stump	19	8
B. W. Mower	20	9
J. C. McCollum	22	9
Defendants' Exhibit 5—Application of E. W. Squires to locate lands	23	10
Defendants' Exhibit 4—Affidavit of E. W. Squires	31	14
Certificate of Surgeon General of California, May 25, 1877	33	15
Testimony of Alfred James	34	15
H. C. F. Austin	35	16
Decisions of Interior Department	37	16
Opinion of Secretary of Interior	38	17
Testimony of George Hansen	41	18

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print
Stipulation as to record from U. S. Land Office	45	20
Certificate of Commissioner of General Land Office, &c.	46	21
Specification of errors	47	21
Two photographic plats	50	22
Order overruling motion for new trial	50	22
Notice of appeal	50	22
Stipulation as to record on appeal	51	23
Judgment	52	23
Opinion	53	24
Bond	54	26
Writ of error	57	28
Citation	59	28
Proof of service of citation	60	29
Clerk's certificate	61	29
Assignment of errors	62	30

1 In the Supreme Court of the State of California.

NATHAN FLETCHER and JOHN D. BICKNELL, Plaintiffs,
vs.
B. W. MOWER, Defendant. } No. 7069.

Transcript on Appeal.

Bicknell & White, attorneys for plaintiffs and appellants.
J. W. Stump, attorney for defendant and respondent.

2 *Complaint to Quiet Title.*

In the District Court, Seventeenth Judicial District, State of California, in and for the County of Los Angeles.

NATHAN FLETCHER and JOHN D. BICKNELL, Plaintiffs,
vs.
B. W. MOWER, Defendant.

Nathan Fletcher and John D. Bicknell, the plaintiffs in this action, complain of the defendant and for cause of action allege:

That the plaintiffs above named are now and for a long time hitherto have been the owners of that certain piece or parcel of land situate, lying, and being in said county of Los Angeles, and bounded and
3 described as follows, viz: The north half of the southwest quarter (N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$) and the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) and the east half of southwest quarter of northwest quarter (E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$), all in section number thirty-two (32), township No. two (2) south, of range No. thirteen (13) west, San Bernardino meridian, containing one hundred and forty acres of land, more or less.

That within five years last past the defendant wrongfully and unlawfully entered into the possession of portion of said land, and is now in possession thereof, holding the same unlawfully and wrongfully and against right.

And plaintiffs further aver that the said defendant claims an interest or interests therein adverse to the plaintiffs, and that the claims of the said defendant are without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever, in said land or premises, or any part thereof.

Wherefore plaintiffs pray that said defendant may be required to set forth the nature of his claim or claims, and that all adverse claims of the said defendant may be determined by a decree of this court; and that by said decree it be declared and adjudged that said plaintiffs are the owners of said premises, and that the de-
4 fendant has no estate or interest whatever in or to the said land and premises, and also that the said defendant be forever debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiffs, and that the said plaintiffs

recover the possession of said lands, and for such other and further relief as to equity as shall seem meet.

And plaintiffs will ever pray, etc.

BICKNELL & WHITE,
Plaintiffs' Attorneys.

Duly verified and filed April 24th, 1879.

Answer.

Title of Court and Cause.

Now comes the defendant in the above-entitled action and answers the complaint filed herein and

I.

Denies on information and belief that plaintiffs are the owners of the land described in said complaint, or that they have been for a long time prior to the commencement of this action, or at all, the owners thereof or of any part thereof.

II.

Denies that within five years last past defendant wrong-
5 fully or unlawfully entered into possession of a portion of said land or that he holds possession thereof or any part thereof, unlawfully or wrongfully or against right.

III.

Further answering defendant denies, on information and belief, that defendant's claims to said land are without any right whatever or that he has no estate, right, title or interest therein or thereto.

For a further and separate answer and defense defendant alleges:

1st. That plaintiffs' chain of title through which plaintiffs' claim title springs from a certain application to purchase said land of the State of California, made by one E. W. Squires, made at a time when said land was not subject to such or any other selection. That the said application did not conform to the requirement of law, that the affidavit and description of land, as required by law to be filed with the county recorder, did not comply with the law. That the certificate of purchase issued thereon and in consequence thereof was illegal, and the patent issued for said land was void and conveyed no title by which these plaintiffs could claim title.

2d. And for a further and separate answer and defense the
6 defendant alleges that he has been in the possession of said land and has exercised control over the same by occupation, cultivation, renting, and payment of taxes thereon either on all or part for the past three years, claiming adversely to the plaintiffs and all other persons, by and in consequence of a claim of pre-emption duly initiated in the U. S. district land office at Los Angeles, made by defendant as a duly qualified pre-emptor in good faith, believing that said land was, at the initiation of said pre-emption claim, public land of the United States, and that on information

and belief defendant alleges the same to be still such public land; that said claim has not yet been determined by the Land Department of the United States.

Wherefore defendant prays that the claims of plaintiffs be declared invalid by the decree of this court; that defendant be declared to be the owner of said land by virtue of his full compliance with the pre-emption laws of the United States; that he have the right of possession of said land against all claim of the plaintiffs, or either of them; that plaintiffs be restrained from further molesting or disturbing defendant in his possession and ownership thereof, and for such other and further order, decree, or judgment as may be just and equitable to defendant, and for costs.

J. W. STUMP,
Attorney for Defendant.

Duly verified and filed June 20, 1879.

7 *Findings and Decision of the Court.*

Title of Court and Cause.

This cause above entitled came on regularly for trial the thirteenth day of June, 1879, before the court without jury, a jury trial having been duly waived by respective parties, and J. D. Bicknell, Esq., appearing as attorney for plaintiffs, and J. W. Stump, Esq., appearing for defendant, and from the evidence introduced the court finds the facts as follows, to wit:

1.

That the plaintiffs have no title to the land described in the complaint, and have never been seized in fee thereof.

2.

That said land was at and long prior to the commencement of this action public land of the United States.

3.

That defendant has been in possession of said land adversely to plaintiffs and all other persons for the past three years by virtue and authority of a duly initiated pre-emption claim before the proper U. S. district land office, and has, during said term, exercised authority over said land by occupation, cultivation, renting,
8 payment of taxes, notoriously to all the world. That defendant is and was a duly qualified pre-emptor, and entitled to pre-empt said land in accordance with the U. S. pre-emption laws. That the pre-emption claim of defendant is still pending undetermined before the U. S. Land Department.

As conclusions of law from the foregoing facts the court finds:

1.

That the plaintiffs are not the owners of the land described in the complaint, and they are not entitled [to] the possession of the same, or any part thereof.

2.

That the defendant is entitled to the possession of said land, of every part and of the whole thereof.

Let judgments be entered accordingly as prayed for by defendant.

SEPULVEDA, *Judge.*

9 *Additional Findings.*

Title of Court and Cause.

On application of both parties in the above-entitled cause the court finds the following facts in addition to those already found, so as to fully respond to the issues made:

4.

That the township lines of township 2 south, range 13 west, S. B. M., in which township the land in controversy is situate, were surveyed by authority of the United States in the year 1853, and the section lines surveyed in February, 1868, and survey approved April 1st, 1868, and the township plat filed in the United States land office in San Francisco, April 22d, 1868, in which district said land was then situate, and said plat was refiled in the United States land office at Los Angeles, November 21st, 1871.

5.

That in pursuance of the application made by E. W. Squires to the State of California to purchase said lands mentioned in the answer of defendants, the State locating agent, under date of April 22d, 1868, located said lands with other lands as school lands in lieu of the S. E. ¼ of sec. 36, T. 4 S., R. 4 W., S. B. M., and in pur-
10 suance thereof the Commissioner of the General Land Office of the United States and Secretary of the Interior listed said land to the State of California under date of November 23d, 1871, and the State of California sold said land to said Squires and issued him a patent therefor under date of October 20th, 1875, and the plaintiffs had acquired before the commencement of this action by mesne conveyances, and still hold all the title conveyed to said Squires by said patent.

6.

That at the time of said selection and location the owners of the Rancho Sausal Redondo claimed that said lands were within the limits of said Rancho.

7.

That George Hansen, deputy U. S. surveyor, surveyed the Rancho Sausal Redondo in February, 1868, under the provisions of the 8th section of the act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California," and the land in controversy was excluded by said survey, and afterwards, owing to a protest filed by the owners of said rancho, another survey of said rancho was

ordered, and one Thompson, deputy U. S. surveyor, made a survey of said rancho in July, 1868, which survey included the land in controversy within the limits of said rancho. Both of said
11 surveys came up regularly before the officers of the Land Department and the survey made by Thompson was rejected, and the survey made by Hansen, with slight modifications was approved and a patent issued for said rancho March 22d, 1875, upon said survey made by Hansen in February, 1868, which survey as approved, and patent, excluded the lands in controversy.

8.

That the defendant claims as pre-emptor the S. ½ of N. W. ¼ and N. ½ of S. W. ¼ of sec. 32, T. 7 S., R. 13 W., S. B. M. That he entered upon the W. ½ of S. W. ¼ of N. W. ¼ of said lands in December, 1875, under an agreement to purchase said twenty acres of land from Nathan Fletcher, one of the plaintiffs herein, and tendered his declaratory statement in U. S. land office claiming the 160 acres above described in March, 1876, tendering the officers of said land office all legal fees, and the said officers refused to file said declaratory statement or permit said defendant to file on said lands, from which ruling said defendant appealed to the Commissioner of the General Land Office, and the same is undetermined by said Commissioner and still pending.

9.

That in December, 1876, said defendant tendered in proof
12 of settlement as required by law to the officers of the U. S. land office and $1.25 per acre for the land and offered to enter the same; that the officers refused to receive the proof and refused to receive the money tendered, on the ground that they did not consider the land open to entry, as the same appeared upon the records of their office to have been listed to the State of California.

10.

That defendant moved upon the lands described in the complaint in January, 1877. That he moved into and took possession of a dwelling-house erected by E. W. Squires, one of plaintiffs' grantors. That said lands had been occupied and exclusively possessed by E. W. Squires and others, claiming said land under the title of State of California, plaintiffs' grantors, since the year 1860, until the entry of defendant. That the lands had all been enclosed, and at the time of the entry of defendant the north 80 acres was enclosed on three sides, and there was upon said lands an orchard, bearing, of about fifteen hundred trees—said orchard being over fifteen years old—dwelling-house, corrals, and out-houses, all of which had been placed upon said lands by E. W. Squires, one of plaintiffs' grantors.

13 11.

The defendant entered upon said lands, claiming the same as a

pre-emptor under the pre-emption laws of the United States, and claims the same as such, and by no other right or title whatever.

12.

That defendant was at the time of said entry, and is, a citizen of the United States, over the age of twenty-one years, and never had the benefit of the pre-emption laws in any of the United States or Territories, and settled upon the land in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public land, and was and is a duly qualified pre-emption settler and fully entitled to privileges of the pre-emption laws of the United States.

Nov. 1, 1879.

SEPULVEDA, *Judge.*

Filed Nov. 1, '79.

14 *Judgment.*

Title of Court and Cause.

This cause came on regularly for trial on the thirteenth day of June, 1879, J. D. Bicknell, Esq., appearing as counsel for plaintiffs, and J. W. Stump, Esq., for defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury, whereupon witnesses on behalf of respective parties were duly sworn and examined, and documentary evidence introduced by respective parties and the evidence closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendant in accordance therewith.

Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed that plaintiffs have no title to the land; that the defendant has the right to the ownership, and is entitled to the possession of said land against any and all claims of the plaintiffs, or either of them; that plaintiffs are henceforth restrained from further molesting or in anywise disturbing defendant in his possession and ownership thereof.

15 And that defendant have his costs and disbursements incurred in this action, amounting to the sum of $12.35.

SEPULVEDA, *Judge.*

Filed September 22, 1879.

Statement on Motion for a New Trial.

Title of Court and Cause.

Be it remembered that this cause came on regularly for trial on the — day of June, 1879, in the above-mentioned court, a jury being expressly waived the same was tried before the court. And the plaintiffs to sustain the issues on their part introduced in evidence the township plat of township 2 S., R. 13 W., S. B. M., records of the U. S. land office, and read the endorsements and entries thereon,

whereby it appeared that the township lines of said township were surveyed by authority of the United States in 1853; section lines run in February, 1868; survey approved April 1st, 1868, by U. S. Surveyor General; township plat filed in land office at San Francisco, in which district said lands were then situate, April 22d, 1868, and refiled in land office at Los Angeles November 21st, 1871. Plaintiff also introduced and read in evidence List No. 1, records of U. S. land office, so far as the same relates to land in controversy,
16 with all certificates thereto attached and endorsements thereon, copy of which is hereto attached and marked Ex. 1, and the same is made a part hereof, whereby it appears said lands were listed to the State of California under date of November 23d, 1871.

Plaintiff then introduced and read in evidence a patent from the State of California to E. W. Squires, dated October 20th, 1875, which patent is in words and figures following:

UNITED STATES OF AMERICA, *State of California:*

To all to whom these presents shall come, Greeting:

Whereas under the provisions of the several acts of Congress of the United States, entitled An act to appropriate the proceeds of the sales of the public lands and to grant the pre-emption rights, approved September fourth, 1841, five hundred thousand acres of the public lands were granted to the State of California, and an act entitled An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes, approved March 3d, 1853, ten sections of land were granted for the erection of public buildings and seventy-two sections for a seminary of learning; also the sixteenth and thirty-sixth sections of each township in said State; also an act entitled "An act donating public lands to the several States and Ter-
17 ritories which may provide colleges for the benefit of agriculture and the mechanic arts, approved July 2d, 1872, one hundred and fifty thousand acres of the public lands were also granted to said State;

And whereas the Legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time;

And whereas it appears by the certificate of the register of the State land office, No. 1285, issued in accordance with the provisions of law, bearing date the 24th day of March, A. D. 1873, that the tracts of grant of 16 and 36 sections school land, hereinafter described, have been duly and properly located in accordance with law, and that E. W. Squires is entitled to receive a patent therefor:

Now, therefore, the State of California hereby grants to the said E. W. Squires, and to his heirs and assigns, forever, the said tracts of land located as aforesaid, and which are known and described as follows, to wit:

The south half of the northwest quarter and the north half of the southwest quarter of section thirty-two (32), township two (2) south, range thirteen (13) west, San Bernardino meridian, contain-

ing one hundred and sixty acres, taken in lieu of one hundred and sixty acres, together with all the privileges and appurte-
18 nances thereunto appertaining and belonging. To have and to hold the aforesaid granted premises to the said E. W. Squires, and to his heirs and assigns, to his and their use and behoof, forever.

In testimony whereof, I, Newton Booth, Governor of the State of California, have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand at the city of Sacramento, this the 31st day of March, A. D. 1873.

NEWTON BOOTH,
Governor of State

Attest: DRURY MELONE,
Secretary of State.

Countersigned: ROBERT GARDNER,
Register of State Land Office.

Recorded in Book 1 of Patents, page 495 and 496, Los Angeles, Cal., May 17th, 1875.

It was then stipulated between the parties in open court and entered of record that the plaintiffs in this action had by mesne conveyances acquired before the commencement of this action, and still have, all the right, title, and interest acquired by said E. W. Squires of the State of California in and to said lands by means of said patent.

19 Plaintiff introduced E. W. SQUIRES as a witness, who was duly sworn, and testified substantially as follows:

I know the land in controversy; I took possession of the north 80 acres in October, 1859, and commenced improving the same; I bought the other 80 about that time; in the fall I commenced ditching and fencing; in the spring of 1860 I planted some trees and built a house; planted eight acres in orchard; planted 1,640 trees; I cultivated the land, put a fence around the whole tract, and cross fences. I remained there until 1870, in October, when I moved, but I kept possession for two years after. When I left there was a very good dwelling-house, frame barn, and fences; I consider the improvements worth at least $2,000; the revenue from the orchard alone was over six hundred dollars per year. I consider that a fair rental of the place for the last two years would be $500 per year.

J. K. STUMP was introduced by plaintiff as a witness, and duly sworn, and testified substantially as follows:

Have known the land in controversy since 1859; the land has been in the possession of Squires, Thomas, Dull, and others up to the time Mr. Mower entered; at the time Mower moved from
20 the twenty acres purchased from Fletcher to the house now occupied by him there was a fence on the east, north, and

south lines, a pole fence; there was a dwelling-house, orchard, etc.; the improvements were worth $1,000; I should consider $400 per year a fair rent for the place.

It was stipulated between the parties that plaintiffs' grantors had been in the exclusive possession of said lands since 1860, until the entry of the defendant, in January, 1877.

Whereupon plaintiff- rested.

The defendant, to sustain the issues on his part, introduced as a witness B. W. MOWER, the defendant, who, being duly sworn, testified substantially as follows:

I entered upon the land claimed by me as a pre-emptor in December, 1875. I entered under an agreement to purchase of Nathan Fletcher twenty acres of the land. In the spring of 1876 I found that Fletcher had no title to the land, and I then claimed the 160 acres as a pre-emptor. I offered to file my declaratory statement in the U. S. land office in the spring of 1876, and tendered the officers of the land office their fees and commissions. They refused to receive the fees or file the declaratory statement, claiming the land had been listed to the State of California, and was not open
21 for pre-emption or homestead entry. In the fall of 1876, more than six months after my tender to file, I again went to the land office with my witnesses and tendered proof and payment as required by law, which was also refused. I took an appeal to the Commissioner of the General Land Office from the refusal to file ond refusal to receive the final proof and payment, which is still pending, so far as I know. I resided on the twenty acres, claiming that and the land described in this action until January, 1877, when I moved into the dwelling-house I now occupy on the land described in the complaint, and have resided there ever since.

It was stipulated that the witness would testify to all the facts necessary to constitute him a qualified pre-emptor under the laws of the United States.

On cross-examination witness testified substantially as follows:

At the time I agreed to purchase the twenty acres, I supposed I was getting a good title, and I moved on the land under the agreement. That I moved into the house I now occupy after McCollum left it. The house is upon the 80 acres, of which the 20 is a part. The house is not on the 20-acre tract. The land was partially enclosed. About 10 acres of orchard bearing. Most of the land had been cultivated. There were corrals on the place. The
22 land and house had been occupied continuously since I knew it up to the time of my entry by different parties claiming under Fletcher. I tendered $200 in land office in payment of land.

J. C. MCCOLLUM was introduced as a witness and duly sworn, and testified in substance:

That he resided on the east 60 acres of the 80 acres of which the 20 acres mentioned formed a part for some time previous to Jan.,

1877. That he had purchased the land of Fletcher and executed to him a mortgage on the land; that in January, 1877, he became satisfied that he had no title to the land by the deed from Fletcher, and he did not intend to spend any more money on it, and he abandoned his interest in the land and moved off, and Mower moved on it soon after. Mower knew he was going to leave, and he made no objection to Mower's moving on the land.

The defendant then offered in evidence a certified copy of the application of E. W. Squires to locate certain lands, dated San Francisco, March 6th, 1868, together with the affidavits of three witnesses and certificate of acceptance of Leander Ransom, State locating agent, dated April 20th, 1868, together with certificate of location made by said State locating agent, and certificate of Robert Gardner, surveyor general, approving said location;
23 also affidavit of said E. W. Squires accompanying said application for location, together with the endorsements thereon; together with the affidavit filed in the county recorder's office of Los Angeles county.

To the introduction of which counsel for plaintiff objected, on the ground that the same was irrelevant and immaterial, and upon the further ground that the defendant in this action, claiming the land as a pre-emptor under the laws of the United States, cannot enquire into or attack any proceedings whereby the State has disposed of said lands; which objection was by the court overruled, and to which ruling the plaintiff then and there in due form of law excepted.

The documents above offered were then read in evidence, and in words and figures following, to wit:

Grant of the 16th and 36th Sections for School Purposes.

STATE OF CALIFORNIA, LOCATING AGENT'S OFFICE.

San Francisco Land District. Location No. 913.

I hereby certify that in accordance with the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, and with the instructions of the surveyor general, I have located as a portion of the
24 school lands one hundred and sixty acres of public land in the county of Los Angeles, at the request and for the use of Elmore W. Squires.

Said land is described as follows: S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 32, T. 2 S., R. 13 W., San Bernardino meridian, taken in lieu of S. E. $\frac{1}{4}$ of sec. 36, T. 4 S., R. 4 W., San Bernardino meridian.

This location has been made by me by filing an application for the same in the name and for the benefit of the State of California at the U. S. land office for the San Francisco district, in the city of San Francisco, and with the consent of James W. Shanklin, register of said district, bearing date the 22d day of April, A. D. 1868,

and the same is entered and numbered upon my register of locations.

Witness my hand at office in San Francisco, this 22d day of April, 1868.

LEANDER RANSOM,
State Locating Agent for the San Francisco Land District.

SURVEYOR GENERAL'S OFFICE,
SACRAMENTO, *22d day of Dec.*, 1871.

The above location is hereby approved and the treasurer of Los Angeles county shall receive in payment therefor, from Elmore W. Squires, forty dollars and thirty-five cents ($40.35) *dollars* within fifty days from the record of the surveyor general's approval, being twenty per cent of the purchase-money and one year's interest on the balance in advance at the rate of ten per cent. per annum from the date of location in the locating agent's office.

ROBERT GARDNER,
Surveyor General,
By —— ———, *Deputy.*

Affidavit

To accompany applications to purchase State lands, as required by act of Legislature passed April 27th, 1863.

I do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies, whether domestic or foreign; that I will bear true faith, allegiance, and loyalty to the said Constitution and Government, any ordinance or law of any State Convention or Legislature, or any rule or obligation of any society or association or any decree or order from any source whatsoever to the contrary notwithstanding, and that I will support the constitution of the State of California; and further, that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title to, interest in, or possession of any land in order that such title, interest, or possession may be transferred to any person or persons to enable such person or persons to evade the provisions of any law of the State of California, or any regulation of the General Land Office at Washington.

ELMORE W. SQUIRES.

Subscribed and sworn to before me, this — day of ——, 186–.

GEORGE J. CLARKE,
Notary Public.

[5-cent rev. stamp.]

I certify the above affidavit and indorsed description of land to be true copies of the originals on file in the office of the county recorder.

T. D. MOTT,
County Recorder of Los Angeles County.
By J. W. GILLETTE, *Deputy.*

(Affidavit indorsed as follows:)

Affidavit and description of land to accompany the application of Elmore W. Squires, Los Angeles county.

No. 913.

Township 2 south, range 13 west, section 32; south ½ of northwest ¼, N. ½ of S. W. ¼, containing 160 acres.

Located March 6, 1868.

Surveyed ———, 186–, by U. S. surveyor general.

27 *Grant of the 16th and 36th Sections for School Purposes.*

Application for Location under the State. Location No. 913.

SAN FRANCISCO LAND DISTRICT,
SAN FRANCISCO, *March* 6, 1868.

To State Locating Agent:

I, Elmore W. Squires, of Los Angeles county, State of California, do hereby apply, under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, to purchase and locate the following described land in Los Angeles county:

The south one-half of the northwest quarter and north half of southwest quarter of section thirty-two (32), township two (2) south, of range thirteen (13) west, of San Bernardino meridian, containing one hundred and sixty acres, according to the returns of the U. S. Surveyor General, and which I agree to accept in lieu of the full amount of 160 acres, for which I agree to pay to the State of California one dollar and twenty-five cents per acre, in the following manner, viz: Twenty per cent. of the purchase-money, together with interest on the balance at the rate of ten per cent. per annum, in advance, from the date of location in the locating agent's office.

This location has been made by me in lieu of S. E. ¼ of sec.
28 36, T. 4 S., R. 4 W., San Bernardino meridian, which is included in a private grant.

Affidavit for Location.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Location No. ——, San Francisco Land District.

I Elmore W. Squires, of Los Angeles county, State of California being duly sworn, depose and say:

That I am a citizen of the United States and a resident of the State of California, of lawful age; that I am an applicant for the purchase and location of the above-described lands. That the same are unoccupied by any person other than myself, and that, to the best of my knowledge and belief, there is no valid claim existing upon the lands so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

Witness my hand.

E. W. SQUIRES.

Sworn and subscribed to before me, this 6th day of March, A. D. 1868.

GEORGE J. CLARKE,
Notary Public.

[5-ct. rev. stamp.]

29 We, J. Q. A. Stanley, W. S. Rosecrans and N. C. Larrabee, of Los Angeles county, State of California, being duly sworn, each for himself, deposes and says:

That he is acquainted with the lands described in the above application and sought to be located by the above-named Elmore W. Squires; that there is no valid claim existing upon the land so described adverse to the claim above named, nor any improvements other than those owned by the said applicant, to the best of his knowledge and belief; and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by the said Elmore W. Squires.

Witness our hands.

J. Q. A. STANLEY.
NORTON C. LARRABEE.
W. S. ROSECRANS.

Sworn to and subscribed before me, this 6th day of March, A. D. 1868.

GEORGE J. CLARKE,
Notary Public.

[Five-cent revenue stamp.]

I, Leander Ransom, State locating agent for the San Francisco land district, do hereby accept the above offer under the following conditions:

That if such location be made and approved by the
30 United States, it shall be for the use and benefit of the applicant on his complying with all the conditions and provisions of the act for the location and sale of lands belonging to the State, approved April 27th, 1863.

LEANDER RANSOM,
Locating Agent.

Office of locating agent, San Francisco, April 20, 1868.

STATE LAND OFFICE, STATE OF CALIFORNIA.

I hereby certify that the annexed and foregoing is a copy of a document on file in my office; that said copy has been compared by me with the original, and is a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 15th day of August, A. D. 1877.

[SEAL.] WM. MINNIS,
Register State Land Office.
By DUNCAN BEAUMONT, *Deputy.*

(Indorsed.)

Cert. 233 issued July 9, 1872.

Patented March 31, 1873.

Grant of the 16th and 36th sections for school purposes.

31 San Francisco land district.

Location No. 1238.

San Bernardino meridian.

Township No. 2 south, range No. 13 west.

Section 32—south ½ of northwest ¼, north ½ of southwest quarter.

Taken in lieu of southeast ¼ sec. 36, in township No. 4 S., range No 4 W., San Bernardino meridian.

Containing 160 acres in lieu of 160 acres.

Located for Elmore W. Squires by Leander Ransom, locating agent.

Received and filed 12th June, 1868.

Approved 22d December, 1871.

ROBERT GARDINER,
Surveyor General,
By ——— ———, *Deputy.*

(Defendant's Exhibit 5.)
Filed February 28th, 1878.

(Copy.)

Affidavit

To accompany applications to purchase State lands, as required by act of Legislature passed April 27th, 1863.

I do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States against all enemies whether domestic or foreign; that I will bear true faith, allegiance, and loyalty to the said Constitution and Government, any ordi-

32 nance or law of any State Convention or Legislature, or any rule or obligation of any society or association or any decree or order from any source whatsoever to the contrary notwithstanding, and that I will support the constitution of the State of California; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever, and that this oath is not taken for the purpose of acquiring title to, interest in, or possession of any land in order that such title, interest, or possession may be transferred to any person or persons to enable such person or persons to evade the provisions of any law of the State of California, or any regulation of the General Land Office at Washington.

E. W. SQUIRES.

Subscribed and sworn to before me, this 6th day of March, 1868.
GEORGE J. CLARKE,
Notary Public.

[Revenue stamp.]

NOTE.—This, after being subscribed and sworn to by the applicant, is to be filed with the county recorder.

(Indorsed.)

Affidavit and description to accompany the application.
Elmore Squires, Los Angeles county.
No. —.
33 Township 2 and 3, range 13, section 32 and 5, containing 160 acres.
Located March 7th, 1868.
Surveyed March 1, 1868.
By U. S. Surveyor General.
Def's Exhibit 4.
Filed March 7, A. D. 1868, at 3 hrs. 58 mins. p. m.
T. D. MOTT,
County Recorder,
By J. W. GILLETTE, *Deputy*.

Filed Feb. 28, 1878.

It was stipulated between the parties and entered of record that the land in question was selected by the State locating agent, and was listed to the State of California in consequence of the application already offered in evidence, and that a patent was issued by the State to E. W. Squires in pursuance of said application.

Defendant then offered in evidence a list of lands, including among others, section 36, T. 4 S., R. 4 W., S. B. M., to which was attached the following certificate:

OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, CALIFORNIA.

I hereby certify that I have made diligent search therein,
34 and that the records of this office do not show that the United States surveyor general for the State of California, ever furnished the State authorities with a list or lists including any of the above-named sections or any part thereof as a basis of selection of other lands in lieu thereof.

Witness my hand and the seal of this office, this 25th day of May, 1877.

WM. MINIS,
Surveyor General.

To the introduction of which plaintiff objected upon the grounds that the same is irrelevant, immaterial, and incompetent, which objections were by the court overruled and the same read in evidence, to which ruling plaintiff then and there in due form of law excepted.

ALFRED JAMES was then called on the part of the defendant, and after being duly sworn, testified substantially as follows, which was admitted by the court over the objection of plaintiff that the same was irrelevant, immaterial, and incompetent:

(It was admitted that Mr. James is register of the United States Land Office.)

Section 36, T. 2 S., R. 4 W., S. B. M., is in place and belongs to the State of California, as appears from the records of my office, and there is no homestead or pre-emption claim thereon.

35 On cross-examination the witness testified substantially that the T. 4 S., R. 4 W., was surveyed in 1856, in the field, and approved in 1857; T. 2 S., R. 13 W., was surveyed in February, 1868, survey approved April 1st, 1868, and township plat filed in the United States land office in San Francisco April 22d, 1868.

The land in controversy being then in the San Francisco Land District, said land was public land, and has been disposed of as public land by the Government of the United States.

H. C. F. AUSTIN was then called as a witness for the defendant, and being duly sworn testified substantially as follows:

Counsel for defendant asked the witness the following question: State whether the land claimed by defendant, S½ of NW¼ and N½ of SW¼ of Sec. 32, T. 2 S., R. 13 W., was ever claimed, in your knowledge, by the grantees of the Sausal Redondo grant; if so, how late?

To which question plaintiff objected, on the grounds that the same was irrelevant, immaterial and incompetent; which objection was by the court overruled, to which ruling the plaintiff then and there in due form of law excepted.

36 To which question witness answered that said lands were claimed as late as 1872, under the act of 1866, as land excluded from the final survey of the Ranch Sausal Redondo.

Counsel for defendant then offered as evidence the patent of the Sausal Redondo Ranch, together with the final survey.

To the introduction of which counsel for plaintiff objected, on the grounds that the same was irrelevant and immaterial.

Which objection was by the court overruled, to which ruling plaintiff then and there excepted, and said patent received in evidence.

It was stipulated between the parties that the Sausal Redondo is a valid Mexican grant, and that a patent has been issued thereon. Said patent is dated 22d day of March, 1875, and does not include the land described in the complaint, or any of the land claimed by defendant as a pre-emptor.

Defendant then offered in evidence the map of the "larger survey," so called, of said Rancho Sausal Redondo, a copy of which is hereto attached, marked Exhibit —.

To the introduction of which plaintiff objected, on the ground that the same is irrelevant, immaterial, and on the further ground that there is no evidence that said map represents any survey of said ranch, or that such a survey was ever made.

37 Which objection was by the court overruled, to which ruling plaintiff then and there excepted in due form of law, and said map was admitted in evidence, a copy of which said map is hereto attached and marked exhibit

Defendant then offered in evidence copies of the decisions of the Secretary of the Interior and Commissioner of the General Land Office in regard to the rejection of the said survey, which contained the following facts and is substantially as follows:

I.

That the Rancho Sausal Redondo was first surveyed by Hancock in 1858, and that this survey was never officially disapproved, and the claimants of the rancho were not notified of any action thereon. It was, however, supposed to become obsolete from length of time which elapsed since its execution.

II.

Instructions were therefore issued directing Deputy Hansen to segregate the grant from the public lands, which was done in 1868, but was not submitted to this office for approval. The surveyor general omitted compliance with the instructions of Commissioner's office, defining his duties under act of 1866, requiring him to give notice to the claimants.

38

III.

The plats of Hansen's survey, filed in the district land office, were recalled by the Surveyor General, and instructions issued for a survey of the rancho under act of 1864, which was made by Deputy Thompson in 1868.

Opinion of Hon. C. C. Delano, Secretary of the Interior.

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY GENERAL,
WASHINGTON, *October* 23, 1871.

Case of the appeal commonly called Sausal Redondo.

Juan B. Alvarado, Governor *ad interim* of Alta, California, on petition of Antonio Ignacio Abila, granted him on the 20th of May, 1837, the tract of land known as Sausal Redondo.

A rude map accompanied the grant.

June 4th, 1846, Pio Pico, "constitutional Governor of the Department of Californias," reciting the fact that Antonio Ignacio Abila had proven said tract to belong to him, granted him said land. No juridical possession was ever given.

June 19th, 1855, the board of land commissioners confirmed Abila's claim to said land, "containing five square leagues."

39 The United States district court for the southern district of California, at its December term, 1856, confirmed the decision of the board of land commissioners, reciting the grant made by Alvarado May 20th, 1837, and locating the land in the present county of Los Angeles, and being within the boundaries of the map which accompanied the original petition of Abila, reference being made to said original grant and said map. Said lands were not to exceed eleven square leagues. This decree became final by

order of the Surveyor General. The first survey is said to have been made by Henry Hancock in 1858, embracing five leagues of land, which was rejected. At the instance of Gen. W. S. Rosecrans, who paid for the expense of the survey, the Surveyor General, purporting to act under the 8th section of the act of Congress of July 23, 1866, directed Geo. Hansen to segregate the grant to Abila from the public lands. This was done in February, 1868, the survey covering about five square leagues.

In the following May the owners of Sausal Redondo filed a protest against Hansen's survey, saying they had applied for an estimate of the survey (which the Surveyor General says never reached him); that no notice of the Hansen survey had been given to the parties in interest, as had been ordered by the Commis-
40 sioner; that the segregation did not conform to the decree.

In response to this protest, Surveyor General Upson recalled the plats of Hansen's survey from the local office May 26th, 1868, and directed a survey to be made under the act of 1864, which was done by G. H. Thompson in July, 1868, embracing nearly eleven square leagues.

The consideration of these two surveys came regularly before the Commissioner and Secretary of the Interior, and were passed upon by said officers, and the Thompson survey was disapproved by the Surveyor General and the Commissioner of the General Land Office.

The "rude map" referred to in Abila's original petition, and mentioned in the decree of the court, gives the north boundary by lands belonging to the city of Los Angeles, on the south by Ranch Gertrudes, on the west by Rancho Ballona, on the east by Rancho Las Cuerbas. According to this, it is said the map measures five square leagues.

Alvardo's grant mentioned no quantity, but Pico limited the quantity to four square leagues; but Pico's grant is not mentioned in the decree of the district court.

The Hansen survey does substantial justice between the parties, and was recommended for approval, and the township plats made by him directed to be restored.

(Signed) C. C. DELANO, *Secretary.*

Defendant then offered in evidence the order of the surveyor
41 general withdrawing the township plat which includes the land in controversy.

To the introduction of which plaintiff objected, on the grounds that the same was irrevelant and immaterial, which objection was by the court overruled, and plaintiff then and there excepted to said ruling in due form.

Said order was then admitted as evidence. (Copy not inserted, as the same has not been filed in the case.)

Defendant then offered in evidence the township plat, which includes the land in question, for the purpose of showing that the same was withdrawn May 26th, 1868, and not entered until

November 21st, 1871, and it appears therefrom that said plat was suspended Jan., 1872, and released from suspension June 15th, 1872.

Defendant then rested his case.

Plaintiff then introduced the following evidence in rebuttal.:

It was stipulated that the evidence of George Hansen, as taken in the case of O'Connor *vs.* Frasher, *et al.*, in this court, should be received in this case, said Hansen's testimony being substantially:

42 That in the year 1868 he was deputy U. S. surveyor, and as such he surveyed the Rancho Sausal Redondo under instruction from the United States Surveyor General. That the following are the original instructions given by said Surveyor General, and under which witness surveyed said ranch.

Plaintiff then offered in evidence said instructions, which are as follows:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CAL., *February* 7, 1868.

SIR: With this I forward a contract for the subdivision of the township below designated, viz:

T'ps 2 and 3 S., R. 13 W., and T'ps 2 and 3 S., R. 14 W., San Bernardino meridian.

In making the survey of these townships you will set off within the boundaries of the latter the line of five square leagues, in satisfaction of the grant of Sausal Redondo, confirmed to A. Y. Abila, in accordance with the accompanying instructions and the 8th section of the act of Congress approved July 23d, 1866, entitled "An act to quiet land titles in California."

Very respectfully,

L. UPSON,
U. S. Surveyor General.

GEORGE HANSEN, Esq., *U. S. Deputy Surveyor, Los Angeles, Cal.*

43 U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *February 7th*, 1868.

SIR: Whereas, in the claim of Antonio Y. Abila to the tract of land hereinafter described, the United States district court for the southern district of California has affirmed the decision of the board of land commissioners, and notice is given by the Attorney General of the United States that no appeal will be further prosecuted therein, I have thought proper to appoint you my deputy in this special case, for the execution of the final survey thereof. The decree of court above referred to, confirming the land known by the name of "Sausal Redondo" and "Guaspita," being the same lands granted by J. B. Alvarado, May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanies the original petition to the Governor for the said lands, reference being had for more particular description to said original grant of said lands and the said map belonging thereto, filed in this cause and copied in said transcript.

Provided that the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for

that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity.

44 The original grant in this case describes the land as follows:

1st. There is conceded to the citizen Antonio Igno. Abila the tract of land called "Sausal Redondo" and "Guaspita," which he actually occupies, etc., without prejudice to the pasture lands of the city as it has not marked out the commons ("ejidos").

2d. That if the land to which reference is made in the foregoing article should be comprehended within the ("ejidos"), of which mention is made, the grantee shall be subject to pay the ground rent which is imposed on it.

A copy of the map referred to is herewith given you.

No application having been made for the survey of this rancho within ten months after the passage of the act of Congress, approved July 23d, 1866, entitled "An act to settle the land titles in California," you are hereby instructed to set off the same, as contemplated by said act. The map or diseño is, by the decree of the court, the governing paper; it contains, according to a scale thereon, about five square leagues. The petition to the board of land commissioners was for that quantity. The "Guaspita" is the portion bordering on the "Ballona Rancho." You will retain three

45 boundaries called for on the diseño, viz., the Bellona, Mar, and San Pedro, and after connecting the "Aguajida Centenella," in accordance with the views of the office, adopt the southern thereof as the line of this rancho, and extend the eastern or closing line so far east as to embrace the old house of Abila, near the spring of Centenella.

Very respectfully,

L. UPSON,
U. S. Surveyor General.

To GEORGE HANSEN, Esq., *U. S. Deputy Surveyor.*

Witness further testified that said instructions were received by him in the due course of his business as deputy U. S. surveyor, and that he surveyed said rancho under said instructions, and it was upon this survey the patent to said rancho was issued.

It was stipulated that the land claimed by defendant, as a preemptor, was, at the date of his entry and is now, within the limits of the withdrawal of the Southern Pacific R. R. Co.

It is hereby stipulated between the parties to this action, that for the purposes of this statement on motion for a new trial, that the record of the U. S. land office introduced in evidence by the plaintiffs listing the lands in controversy to the State of California is in usual form, and it appears by said list that the lands in con-

46 troversy in this action, with other lands, were listed to the State of California in lieu of the S. E. ¼ of sec. 36, T. 4 S., R. 4 W., S. B. M., and that the same was selected April 22d, 1868, and upon said lists were the following certificates.

J. W. STUMP,
Attorney for Defendant.
JOHN D. BICKNELL,
Attorney for Plaintiff.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Nov. 23d*, 1872.

It is hereby certified that the tracts described in the foregoing list are embraced in the original lists, now on file in this office, of lands selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3d, 1853, February 26th, 1859, and July 23d, 1866.

It is further certified that the said tracts have been examained and compared with the township plats and tract book of this office, and that the indemnity is properly due to the township for which selected; are found to be subject to selection and free from conflict, and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

WILLIS DRUMMOND,
Commissioner.

47 DEPARTMENT OF THE INTERIOR, *November 24th*, 1871.

The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

C. DELANO, *Secretary.*

GENERAL LAND OFFICE, *23d November*, 1871.

The tracts embraced in the following list has been critically examined, and are found to be free from conflict and to enure to the State for the purposes indicated.

M. MABLEY.
JAS. J. BARNS.

Specifications of Errors.

Plaintiffs here assign and specify the errors of law committed by the court upon the trial of said cause, which were duly excepted to by plaintiffs:

1st. The court erred in overruling the plaintiffs' objections and admitting as evidence the certified copy of the application of E. W. Squires to locate and purchase the lands in controversy in this action and affidavits of witnesses thereto, and certificate of acceptance by
48 State locating agent, and the other certificates and affidavits attached to said application, for the reasons and upon the set forth in the plaintiffs' objection thereto, as set ground forth in the foregoing statement.

2d. The court erred in overruling the objections made by plaintiffs and admitting as evidence the copy of list and certificate of Wm. Minis, surveyor general, purporting to show that certain lists are not now on file in his office as a record thereof, upon the grounds and for the reasons set forth in plaintiffs' objection thereto.

3d. The court erred in overruling the plaintiffs' objections and permitting the witness, H. C. Austin, to testify as to the claims made by the owners of the Rancho Sausal Redondo as to the boundaries

thereof, upon the grounds and for the reasons stated in the objections thereto, as set forth in the foregoing statement.

4th. The court erred in admitting as evidence against the objections of the plaintiffs the patent of the Rancho Sausal Redondo, for the reasons and upon the grounds stated in the objections thereto, as set forth in the foregoing statement.

5th. The court erred in admitting as evidence against the objections thereto by plaintiffs, the map of "large survey," or "Thompson survey" (so called) of the Rancho Sausal Redondo, for the reasons and upon the grounds stated in the objections thereto, as set forth in the foregoing statement.

49 6th. The court erred in admitting as evidence against the objections of the plaintiffs the copy of order of surveyor general withdrawing the township plat therein referred to, for the reasons and upon the grounds set forth in the objections thereto, as appears in the foregoing statement.

Plaintiff here particularly assigns and specifies wherein the evidence in this cause is insufficient to justify the findings and decision in this cause:

Finding No one is wholly repugnant and unsustained by the evidence introduced in this cause, in this, that it appears from the evidence that plaintiffs were at the commencement of this action, and still are owners in fee of said lands.

Finding No. two is not sustained by the evidence, and is wholly repugnant thereto, in this, that it appears from the evidence that the United States had disposed of said lands long before the commencement of this action, and that the same is not now and has not been public land since 1868.

Finding No. three is not sustained by the evidence, and is wholly repugnant thereto in every particular.

Wherefore the plaintiffs ask that a new trial be granted in said cause.

JOHN D. BICKNELL,
Attorney for Plaintiffs.

(Here follow 2 photographic plats, marked p. 50.)

50 I hereby certify that the foregoing statement on motion for a new trial is hereby allowed.

SEPULVEDA, *Judge.*

November 25th, 1879.

Minutes of Court on Ruling on Motion for a New Trial.

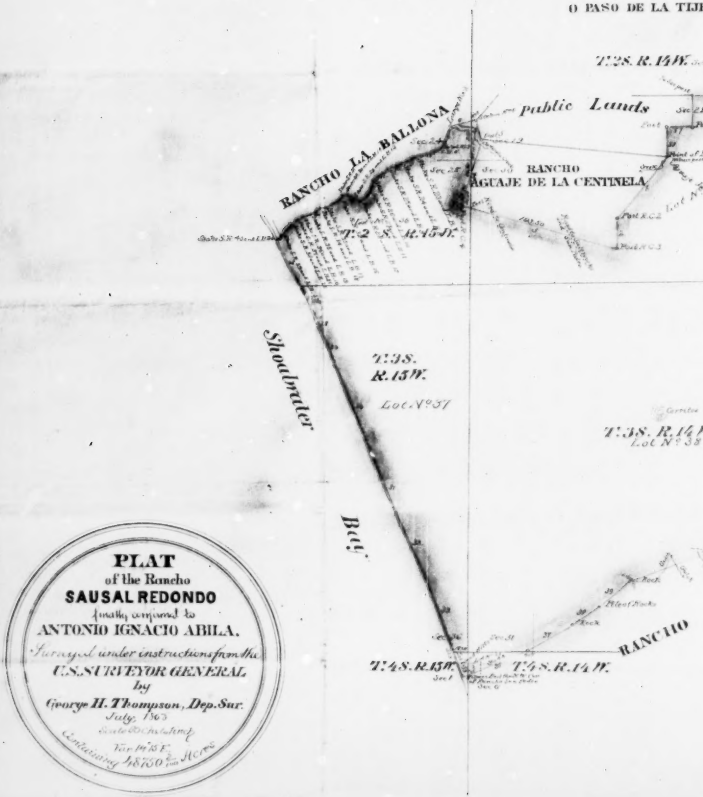
Title of Court and Cause.

Minute Book No. 18, p. 165.
November term, Dec. 30th, 1879.
Motion for new trial denied. Thirty days' stay.

Notice of Appeal.

Title of Court and Cause.

You will please take notice that the plaintiffs in the above-entitled



PLAT
of the Rancho
SAUSAL REDONDO
finally confirmed to
ANTONIO IGNACIO ABILA.
Surveyed under instructions from the
U.S. SURVEYOR GENERAL
by
George H. Thompson, Dep. Sur.
July 1865
Scale 80 chs to the inch
Var. 16°15' E.
Containing 46850 Acres

CITY LANDS OF LOS ANGELES

CHO CIENEGA
DE LA TIJERA

T.2S. R.13W.

Lot N°39

Public lands

T.3S. R.13W.

RANCHO TAJAUTA

S. R. 14 W.
Lot N° 38

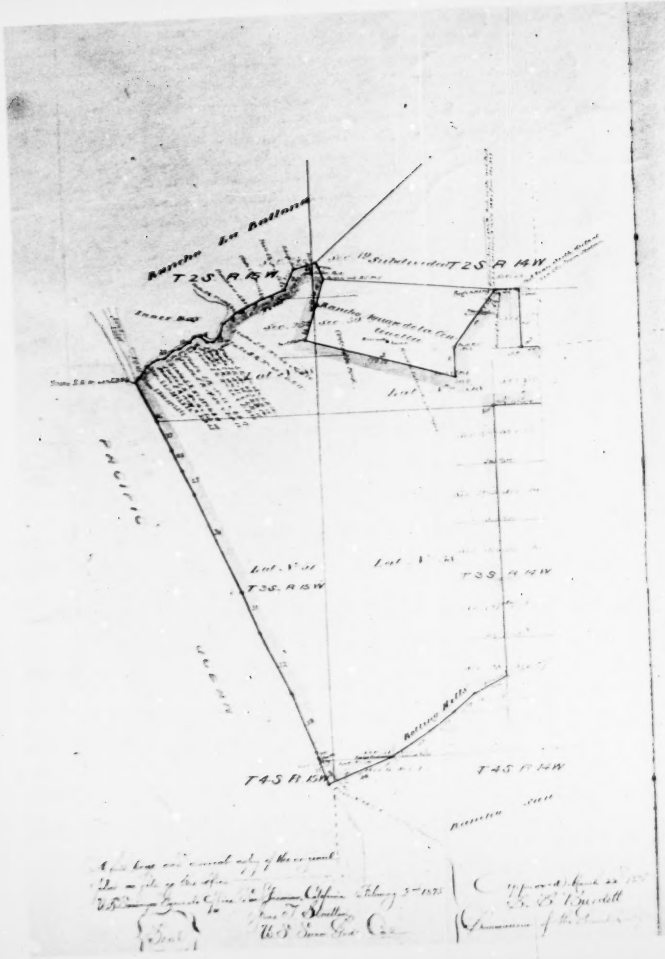
ANCHO SAN PEDRO

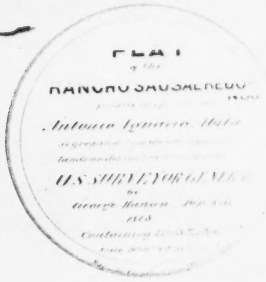
Boundaries

N°	Courses	Distance	N°	Courses	Distance
1	S 38½ W	85.00	30	S 23 E	14.50
2	West	40.00	31	East	60
3	N 75½ W	245.00	32	S 24½ W	90
4	[illegible]	[illegible]	33	[illegible]	[illegible]
5	[illegible]	[illegible]	34	[illegible]	[illegible]
6	S 75½	24.00	35	S 23½ E	37
7	S 64½ W	34.00	36	N 89½ E	4
8	S 78½	30.00	37	S 38½ W	64.00
9	S 68½	19.62	38	S 52½	46.00
10	S 84½	19.50	39	S 34½	34.00
11	S 74½	33.00	40	S 69½	200.00
12	S 37½	17.00	41	S 67½ W	84.00
13	S 39½	17.33	42	S 71½	33.00
14	N 81½	8.00	43	S 51½	16.00
15	S 82½	14.00	44	North	378.00
16	S 73½	8.00	45	East	60.00
17	[illegible]	8.00	46	North	40.00
18	S 66½	21.00	47	East	3936
19	[illegible]	1.00	48	North	1870.00
20	S 52½	3.00	49	West	2160.00
21	S 36½	10.00	50	South	1.00
22	S 62½	3.00	51	West	1080.00
23	S 50½	9.00	52	South	900.00
24	S 42½	18.00	53	East	40.00
25	S 28½	3.00	54	South	1080.00
26	S 77½	87.00	55	West	80.00
27	S 26½	42.00	56	South	1440.00
28	S 8½	31.00	57	West	3150
29	S 2½	34.00	58	South	3796

I do hold notes of the Ranchos Cienega Redonda Tajauta & Aliso
to Antonio Ignacio Avila from which the Plat hereto annexed has been examined and appears true and correct to this Office
U.S. Surveyor General's Office
San Francisco, California
April 14th 1869.

U.S. Surveyor General


Rancho La Ballona
T 2 S R 14 W
T 2 S R 15 W
Indian Bluff
Rancho Sausal Redondo
PACIFIC
Lot N° 51
T 3 S R 15 W
Lot 1
T 3 S R 14 W
Redondo Bluffs
T 4 S R 15 W
T 4 S R 14 W


PLAT
of the
RANCHO SAUSALITO
Antonio Ignacio Soto
U.S. SURVEYOR GENERAL
Public
Private
Bounderies

action hereby appeal to the supreme court of this State from the judgment rendered therein and entered in the said district court on the 22d day of September, 1879, in favor of the defendant in said action and against said plaintiffs, and from the whole thereof;
51 and also from the order denying said plaintiffs' motion for a new trial made and entered in said cause on the 30th day of December, 1879.

Dated this 25th day of February, 1880.

Yours, etc., JOHN D. BICKNELL,
Attorney for Plaintiffs.

To the clerk of said district court, and J. W. Stump, attorney for defendant.

Endorsed: Due service & receipt of a copy hereof admitted after filing, this 25th day of Feb., 1880. J. W. Stump, att'y for def't.

Stipulation.

Title of Court and Cause.

It is hereby stipulated that the foregoing transcript on appeal contains a full, true, and correct copy of the following papers on file and of record in this cause, to wit: Complaint, answer, findings, judgment, statement on motion for a new trial, order denying new trial, and notice of appeal, together with the endorsements thereon; also that an undertaking on appeal in due form of law has been properly given and filed herein within the time and in the manner prescribed by law.

J. W. STUMP,
Att'y for Def't.
JOHN D. BICKNELL,
Att'y for Plaintiffs.

Dated this 25th day of Feb., 1880.

(Endorsed:) Filed March 9th, 1880. F. W. Gross, clerk, by John O. Wheeler, deputy.

Service accepted by copy this 25th day of February, 1880.
J. W. STUMP,
Att'y for Def't.

52 *Judgment.*

In the Supreme Court of the State of California. Oct. Term, 1880.
In Bank.

NATHAN FLETCHER and JOHN D. BICKNELL, Pl'ffs & Appellants,
vs.
B. W. MOWER, Def't & Respondent. } No. 7069.

On appeal from the district court of the 17th judicial district in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been

heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Sharpstein, J., Thornton, J., Ross, J., McKee, J., Myrick, J., McKinstry, J., concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order denying motion for a new trial of the district court of the 17th judicial district in and for the county of Los Angeles, in the above-entitled cause, be, and the same is hereby, reversed with costs, and cause remanded to the superior court of Los Angeles county with directions to that court to enter judgment upon the findings, that the plaintiff recover the premises described in the complaint, and that the remittitur herein issue to the superior court of Los Angeles county.

53 *Opinion.*

In Bank.

(Filed October 18, 1880.)

NATHAN FLETCHER and JOHN D. BICKNELL *vs.* D. W. MOWER. } No. 7069.

Although the complaint in this action is entitled a "complaint to quiet title," it contains all the material allegations of a complaint in ejectment, and we shall treat it as such. It avers the ownership of the plaintiffs, the wrongful entry and possession of the defendants, and prays, among other things, that the plaintiffs recover the possession of the premises. The plaintiffs are entitled to such relief, within the issues, as they have proved themselves entitled to without regard to the mere form of the pleading.

The defendant in his answer denies that the plaintiffs are the owners of said land, or any part thereof. He further denies that within five years last past he "wrongfully or unlawfully entered into possession of a portion of said land, or that he holds possession thereof, or any part thereof, unlawfully or wrongfully or against right," which amounts to an admission that he did in fact enter into possession, and still holds the same.

For a further and separate answer defendant alleges that plaintiffs' claim of title is based upon an application of one E. W. Squires to purchase said land from the State, made at a time when said land was not subject to selection, and that said application did not conform to the requirements of law in respect to the affidavit and description of the land to be filed with the county recorder, and that the certificate of purchase and patent issued by the State were illegal and void.

And for a further separate answer the defendant alleges that he has been in possession of said land, exercising control over it by occupation, cultivation, renting, and payment of taxes thereon for the past three years, claiming adversely to the plaintiffs and all other persons, by and in consequence of a claim of pre-emption

duly initiated in the U. S. district land office at Los Angeles, made by him in good faith, believing that said land was at the initiation of said pre-emption claim public land of the United States, and on his information and belief he alleges that it still is, and that his claim has not yet been determined by the Land Department of the United States.

Upon these pleadings the parties went to trial, and a judgment was rendered in favor of the defendant, from which this appeal is taken.

The court found substantially as follows: That the section lines within which the land in controversy lies were surveyed by authority of the United States in February, 1868, and said survey approved April 1, 1868; that the township plat which included said land was filed in the U. S. land office in San Francisco April 22, 1868, and aftewards refiled at Los Angeles November 21, 1871.

"That in pursuance of said application of said Squires to purchase said land the State locating agent, on the 22d of April, 1868, located said land, with other lands, as school lands, in lieu of the S. E. ¼ of section 36, T. 4 S., R. 4 W., S. B M., and the Commissioner of the General Land Office and the Secretary of the Interior, on the 23d of November, 1871, listed said lands to the State, and the State issued a patent therefor to said Squires, from whom the plaintiffs deraign title through mesne conveyances.

"That at the time of said selection and location the owners of the Rancho Sausal Redondo claimed that said lands were within the limits of said rancho; that two surveys of said rancho were made in 1868, one of which excluded and the other included the land in controversy within the lines of said rancho. The one excluding said land was finally approved, and a patent was issued in accordance therewith on the 22d of March, 1875.

"That the defendant claims as pre-emptor the S. ½ of N. W. ¼ and N. ½ of S.W. ½ of sec. 32, T. 7 S., R. 13 W., S. B. M. That he entered upon the W ½ of S. W. ¼ of N. W. ¼ of said lands in Dec., 1875, under an agreement to purchase said twenty acres of land from Nathan Fletcher, one of the plaintiffs herein, and tendered his declaratory statement in the U. S. land office, claiming the 160 acres above described, in March, 1876, tendering the officers of said land office all legal fees, and the said officers refused to file said declaratory statement or permit said defendant to file on said lands, from which ruling said defendant appealed to the Commissioner of the General Land Office, and the same is undetermined by said Commissioner and still pending.

"That in December, 1876, said defendant tendered in proof of settlement as required by law to the officers of the United States land office $1.25 per acre for the land, and offered to enter the same; that the officers refused to receive the proof, and refused to receive the money tendered, on the ground that they did not consider the land open to entry, as the same appeared upon the records of their office to have been listed to the State of California.

"That defendant moved upon the lands described in the complaint in January, 1877. That he moved into and took possession

of a dwelling-house erected by E. W. Squires, one of the plaintiffs' grantors; that said lands had been occupied and exclusively possessed by E. W. Squires and others, claiming said lands under the title of State of California, plaintiffs' grantors, since the year 1860, until the entry of defendant; that the lands had all been enclosed, and, at the time of the entry of defendant, the north 80 acres was enclosed on three sides, and there was upon said lands an orchard, bearing, of about 1,500 trees—said orchard being over fifteen years old—dwelling-house, corrals, and out-houses, all of which had been placed upon said lands by E. W. Squires, one of plaintiffs' grantors."

It is also found that the defendant was a qualified pre-emptor when he entered upon the land, and that he has entitled himself to all the rights of a pre-emption claimant, provided the land was subject to pre-emption at the time of his entry.

The conclusion of the court was that, upon these facts, the plaintiffs were not the owners of the land, and that the defendant was entitled to the possession of it.

But it is quite obvious that the plaintiffs, by virtue of their prior possession, as found by the court, were entitled to recover the possession of the premises from a mere naked intruder, which the defendant is found to be. It is unnecessary, therefore, in this action to determine whether or not the plaintiffs have acquired title from the paramount source, because it is conceded that the defendant has not. The maxim *qui prior est tempore, portior est jure*, is applicable to this case.

This doctrine has become so familiar to the bar of this State as to render any elaboration of it wholly unnecessary.

Judgment and order denying motion for a new trial reversed, and cause remanded to the superior court of Los Angeles county, with directions to that court to enter judgment upon the findings that the plaintiffs recover the possession of the premises described in the complaint.

SHARPSTEIN, J.

We concur.

McKEE, J.
THORNTON, J.
MYRICK, J.
ROSS, J.
McKINSTRY, J.

54 *Bond.*

In the Supreme Court of the United States.

B. W. MOWER, Plaintiff in Error,

vs.

NATHAN FLETCHER and JOHN A. BICKNELL, Defendants in Error.

Know all men by these presents, that we, B. W. Mower, as principal, and M. D. Johnson and A. S. Shorb, as sureties, all of the county of Los Angeles, State of California, are held and firmly bound unto Nathan Fletcher and John D. Bicknell, defendants in error, in

the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Nathan Fletcher and John D. Bicknell, their heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

55 Sealed with our seals; dated the twelfth day of September, A. D. 1882.

Whereas B. W. Mower, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California, in a certain action entitled Nathan Fletcher and John D. Bicknell, plaintiffs, *vs.* B. W. Mower, defendant:

Now, therefore, the condition of this obligation is such, that if the above-named B. W. Mower shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

B. W. MOWER. [SEAL.]
M. D. JOHNSON. [SEAL.]
A. S. SHORB. [SEAL.]

Signed, sealed, and delivered in presence of—
E. BAXTER.

56 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

M. D. Johnson and A. S. Shorb, sureties on the above bond, being duly sworn, each for himself, deposes and says: That he is a resident and freeholder in the said county of Los Angeles, State of California, and is worth the sum of five hundred dollars, lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

M. D. JOHNSON.
A. S. SHORB.

Subscribed and sworn to before me, this 13th day of September, A. D. 1882.

[SEAL.] F. W. GROSS,
Clerk Supreme Court Cala.,
P. JOHN O. WHEELER, *Deputy.*

It is hereby ordered that the am't of the within bond be fixed, and the same is hereby fixed at the sum of five hundred ($500.00) dollars.

R. F. MORRISON,
Chief Justice of California.

Dated September 8th, 1882.

(Endorsed:) Filed Sept. 20, 1882. F. W. Gross, clerk, by J. B. Martin, deputy.

57 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court, before you, between B. W. Mower, plaintiff in error, and Nathan Fletcher and John D. Bicknell, defendants in error, wherein was drawn — certain titles, rights, privileges, and immunities claimed by said plaintiff in error by virtue of statutes of the United States, and the decision of said supreme court was against such rights, titles, privileges, and immunities, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] L. S. B. SAWYER,
Clerk of the U. S. Circuit Court, Dist. of Cala.,
By J. F. O'BEIRNE,
Deputy Clerk.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

58 [Endorsed:] 7069. United States Supreme Court. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher *et al.*, defendant in error. Writ of error. Filed Sept. 8, 1882. F. W. Gross, clerk, by J. B. Martin, deputy.

59 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Nathan Fletcher and John D. Bicknell, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at the

Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein B. W. Mower is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. F. Morrison, chief justice of the supreme court of the State of California, this eighth day of September, A. D. 1882, and of the Independence of the United States the 107th.

[SEAL.] R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

Attest: F. W. GROSS, *Clk*,
By J. A. McKENNA, *Deputy*.

60 [Endorsed:] United States Supreme Court. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher *et al.*, def'ts in error. Citation. Filed Sept. 20, 1882. F. W. Gross, clerk, by J. B. Martin, deputy. Edwin Baxter, att'y for plaintiff in error. Wm. J. Johnston, of counsel.

I hereby acknowledge the receipt of a copy of the within citation, this 15th day of September, 1882.

BICKNELL & WHITE,
Att'ys for Plaintiff- and Appellants in Supreme Court of the State of Cal.

61 *Clerk's Certificate.*

In the Supreme Court of the State of California.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER *et al.*, Defendants in Error. } 7069

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing 61 pages, numbered from 1 to 61, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above-entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said court, this 22nd day of September, A. D. 1882.

[SEAL.] FRANK W. GROSS, *Clerk*,
By C. HARLAN, *Deputy*.

62 *Assignments of Error.*

UNITED STATES OF AMERICA :

In the Supreme Court of the United States.

B. W. MOWER, Plaintiff in Error,

vs.

NATHAN FLETCHER and JOHN D. BICKNELL, Defendants in Error.

Error to the supreme court of the [State of] California.

And now comes said plaintiff in error, by Edwin Baxter and Wm. J. Johnston, his counsel, and says that in the record and proceedings, and in the rendition of the judgment in this cause in the supreme court of the State of California, there was drawn in question the construction and the constitutionality of the statutes of the United States in relation to the disposition of the public lands
63 of the United States and such statutes by such decision of said State court were erroneously construed, and such decision and construction of such statutes was against the right, title, and privileges of said plaintiff in error, set up or claimed under such statutes.

And said plaintiff in error says that in the said decision and judgment of said supreme court of the State of California there are manifest errors, to wit:

Said supreme court of said State erred—

I.

In deciding that said defendants in error were entitled to the possession of the land in controversy, as against said plaintiff in error.

II.

In deciding that said defendants in error (plaintiff in said action in said court) had any legal or equitable right to the possession of said lands and premises, as against the United States, or against
64 any person claiming under them by virtue of the pre-emption laws of the United States, and an entry thereunder, and compliance with the same, as an actual settler upon such land.

III.

In deciding that defendant in said court (plaintiff in error here) was a mere naked intruder, as against plaintiffs (defendants in error here).

IV.

In assuming by such decision that said defendant in said court was not entitled to the possession of said land by virtue of his proceedings under and compliance with the pre-emption laws of the United States, and that his offered payment for such land, which was neglected by the U. S. local land officers, was not equivalent to payment.

V.

In assuming by such decision that said plaintiffs below had ac-

quired any right to the possession of said lands by their pre-
65 tended title, derived through or from one E. W. Squires, and his possession of said land.

VI.

That said decision and judgment of said State court is unjust and inequitable, and not according to law.

Plaintiff in error therefore prays that the decision and judgment of said supreme court of the State of California may be reversed, and the decision and judgment of the trial court in said cause affirmed, and for costs.

EDWIN BAXTER, *Attorney.*
WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

66 [Endorsed:] In the Supreme Court of the United States. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher and John D. Bicknell, defendants in error. Assignments of error. Edwin Baxter, Los Angeles, Cal. Wm. J. Johnston, Washington, D. C., counsel for pl'ff in error. Supreme Court U. S. 1882, October term. No. 1059. B. W. Mower, pl'ff in error, *vs.* Nathan Fletcher and John D. Bicknell. Assignment of errors. Filed 13th Oct'r, 1882.

We hereby acknowledge receipt of a copy of the within assignment of error.

Los Angeles, Cal., Oct. 3, 1882.

BICKNELL & WHITE,
Att'ys for Defendants in Error.

Endorsed on cover: California sup. court. No. 373. B. W. Mower, plaintiff in error, *vs.* Nathan Fletcher and John D. Bicknell. Filed 13th October, 1882.

116-380

In the Supreme Court of the United States

OCTOBER TERM, 1884.

B. W. MOWER,
Plaintiff in Error,
vs.
NATHAN FLETCHER AND JOHN BICKNELL,
Defendants in Error.

No. 373.

In Error to the Supreme Court of the State of California.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

WASHINGTON, D. C.
C. W. BROWN, PRINTER, 923 F ST., N. W.
1885.

In the Supreme Court of the United States

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER and JOHN BICKNELL,
Defendants in Error.

No. 373.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

This motion to dismiss ought not to be granted.

I.

It appears affirmatively by the record that this appeal was taken from a *final* judgment of the Supreme Court of the State of California, which is in the following words:

"Whereupon, it is now considered, ordered, adjudged and decreed by the court here, that the judgment and order denying motion for a new trial of the district court of the 17th judicial district in and for the county of Los Angeles, in the above entitled cause, be, and the same is hereby reversed with costs, and cause remanded to the Superior Court of Los Angeles County, with directions to that court to *enter judgment upon the findings, that the plaintiff recover the premises described in the complaint,* and that the *remittitur* herein issue to the Superior Court of Los Angeles County."

II.

The authorities relied on by counsel for defendants in error,—

McCombs *vs.* Commissioners, 91 U. S., p. 1;
Young *vs.* Emslie, No. 170, Docket of present term;
Davis *vs.* Crouch, 94 U. S., 514,

utterly fail to support the theory sought to be established, that the foregoing is not a *final* judgment; and an examination of these cases will show that they are in no sense parallel to this under consideration, and afford no authority for the action prayed for.

In each of these cases it clearly appears that the action of the court in dismissing the writ was based upon the fact that the judgment appealed from remanded the cause for further proceedings in the lower court; hence was not *final*, because it did not terminate the litigation between the parties to the suit.

That a judgment may be one of reversal, and yet not a *final* judgment, reviewable here, may be readily conceded, as this principle has been well established by numerous decisions of this court, besides those cited by counsel for defendants in error; but all of these cases show that the cause was remanded for *further proceedings* in the court below; hence the judgment was not *final*, because the cause might yet be determined in favor of the plaintiff in the State courts. The only plain and reasonable deduction to be reached from an examination of these cases, is, that had the judgment appealed from decided and disposed of the merits of the cause, and reserved no further questions or directions for the future judgment of the court, so that it would not be necessary to bring the cause again before that court, it would have been held to be a *final* judgment, reviewable here.

In McCombs *vs.* ~~U. S.~~ Young relied upon by counsel for defendants in error, the case was taken on writ of error to the

Supreme Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining the demurrer to the replies, but upon suggestion by McComb that he might ask leave to amend his answer, the case was remanded for further proceedings, according to law. Upon the filing of the mandate in the Common Pleas, that court, in accordance with the decision of the Supreme Court, overruled the demurrer to the replies, and sustained that to the answer. McComb did not ask leave to amend his answer, but elected to rely upon his defense, as already stated; thereupon, the court (of Common Pleas) gave judgment against him upon the case made by the petition. The writ of error was prosecuted to reverse that judgment.

This court held that the court of Common Pleas was not the highest court of the State, and that it was called on to examine the judgment of that court alone. That the judgment of the Supreme Court of the State was one of reversal only, and not a final judgment. That the Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution (as in this case), but had ample power to permit the parties to make a new case by amendment, which would be subject to appeal and judgment thereon, and for that reason was not a final judgment of the highest court of a State, and within the provisions of Sec. 709, Revised Statutes.

The cases of Young *vs.* Emslie and Davis *vs.* Crouch, *supra*, also relied upon by counsel for defendants in error, are of the same character, and were not final judgments, but, as correctly stated by counsel, were "remanded for further proceedings in accordance with the views of the court as expressed."

In Houston *vs.* Moore, 3 Wheat., 433, suit was commenced in the court of Common Pleas, the jury found for plaintiff, upon which judgment was rendered. The cause was carried to the Supreme Court of Pennsylvania, where the judgment of the Common Pleas was reversed, and the cause remanded

with directions to award a *venire facias de novo.* Chief-Justice Marshall held that this was not a final judgment, as the cause may yet be determined in favor of the plaintiff in the State court, and dismissed the writ.

In Pepper *vs.* Evans, 5 How., 51, Chief-Justice Taney dismissed the writ, because the decree remanding the case for further proceedings specifically stated that the evidence did not enable the court to finally pass upon the rights of the parties, and especially as to the amount to be refunded, hence the judgment was not a final one.

In St. Clair Co. *vs.* Livingston, 18 Wall., 628, wherein the judgment appealed from remanded the cause for further proceedings, this court held that no judgment is final which does not terminate the litigation between the parties to the suit; that in that case the issue between the parties might be again tried before the Circuit Court, and another judgment recovered, which might be removed to the Supreme Court for revision, consequently there had been no final determination of the cause. The plain import of these decisions must be, that had the judgments appealed from been determinative of the rights of the parties to the suits, and ended the litigation between them in that court, they would have been held *final* judgments, properly reviewable by this court.

To the same purport are the following:

Tracy *vs.* Holcomb, 24 How., 426.
Moore *vs.* Robbins, 18 Wall., 588.
Mayberry *vs.* Thompson, 5 How., 121.
Brown *vs.* Union Bank of Fla., 4 How., 465.
U. S. *vs.* Fossatt, 21 How., 443.
U. S. *vs.* Gerault, 11 How., 22.
Farrelly *et al. vs.* Woodfolk, 19 How., 288.
Boyle *vs.* Zacharie & Turner, 6 Pet., 648.
Smith *vs.* Trobue's heirs, 9 Pet., 4.
Taylor *vs.* Morton, 2 Black., 481.
Winn's heirs *vs.* Jacobson *et al.*, 12 Wheat., 135.

On the question as to what constitutes a final judgment or decree, this court in Sparrow *vs.* Strong, 3 Wall., 97, overruled the motion to dismiss, where a motion for new trial was pending, and doubt existed in the mind of the court whether it had ever been decided; the only judgment found being a general judgment. It was held final and reviewable.

In Beebe *et al. vs.* Russel, 19 How., 283, this court held that where a decree finally decides and disposes of the *merits* of a cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree; that when only ministerial duties remain to be done under direction of the court, as to ascertain a sum due (or, as in this case, to enter judgment upon the findings), it is a *final* decree or judgment, and the direction is but a consequence of the decree. In the case of Farrelly *et al. vs.* Woodfolk, 19 How., 288, the rule in the foregoing case was affirmed and applied.

In view of the foregoing, and tested by the rule in the cases cited, we submit, that the judgment in this case, entered by the Supreme Court of California, was and is a *final* judgment, mandatory upon the court below, and the entering thereof by the district court of Los Angeles, a mere ministerial duty; the direction so to do, but a consequence of the judgment; that as such *final* judgment, it was appealable by writ of error.

We ask that the motion may be denied.

WILLIAM J. JOHNSTON,
Counsel for Plaintiff in Error.

116380

IN THE

Supreme Court of the United States.

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER and JOHN D. BICKNELL,
Defendants in Error,

No. 373.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Motion and Argument of Defendants in Error to dismiss for want of jurisdiction.

M. D. BRAINARD.
JAMES K. REDINGTON.
Counsel for Defendants in Error.

WASHINGTON, D. C.
BYRON S. ADAMS, PRINTER,
514 Eighth Street, N. W.

IN THE

Supreme Court of the United States.

October Term, 1884.

B. W. MOWER,
Plaintiff in Error,

vs.

NATHAN FLETCHER and JOHN D. BICKNELL,
Defendants in Error,

No. 373.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION OF DEFENDANT IN ERROR TO DISMISS FOR WANT OF JURISDICTION.

Now come the defendants in error and move the court to dismiss said case for want of jurisdiction upon the following ground, to wit:

Because the judgment from which said appeal was taken is not a final judgment in said case.

NOTICE TO COUNSEL.

To William J. Johnson, Esq., of counsel for plaintiff in error:

You will please take notice that the foregoing motion will be made and argued in the Supreme Court of the United States on Monday, March 23, 1885, or as soon thereafter as the court hear the same.

Respectfully,

M. D. BRAINARD,

JAMES K. REDINGTON,

Counsel for Defendants in Error.

Service of copy acknowledged this 27th day of February, A. D. 1885.

W. J. JOHNSTON,

Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

This cause was originally tried in the District Court of the 17th Judicial District for Los Angeles County, California, and judgment was rendered for the defendant (Mower) on June 13th, 1879, and thereupon an appeal was taken by the plaintiffs (Fletcher and Bicknell) to the Supreme Court of California. On October 19th, 1880, the Supreme Court of California reversed the judgment of the District Court, for the reasons stated at length in an opinion filed (*vide* p. 24 Record) and remanded the case to the lower court for further proceedings. The judgment of the Supreme Court is in these words: "Whereupon, it is now considered, ordered, adjudged and decreed, by the court here, that the judgment and order denying motion for a new trial of the District Court of the 17th Judical District, in and for the County of Los Angeles, in the above entitled cause, be, and the same is hereby, reversed with costs, and cause remanded to the superior court of Los Angeles County with directions to that court to enter judgment upon the findings that the plaintiff recover the premises described in the complaint, and that the remittitur herein issue to the superior court of Los Angeles County." P. 23 Record.

The record does not show that final judgment was entered

by the District court pursuant to this judgment and decree of the Supreme Court.

This appeal is taken from the judgment of the Supreme Court of California above quoted.

Argument.

Under Section 709, Revised Statutes, this court has jurisdiction to re-examine, reverse or affirm, upon writ of error, the *final judgments* or decrees of the highest court of a State in certain cases therein mentioned.

The judgment sought to be reviewed, must, by the express terms of this Statute, be a *final judgment*, otherwise this court is without jurisdiction to re-examine it.

The judgment rendered by the Supreme Court of California, in this case, shows upon its face that it is not a *final judgment*.

It is plainly a judgment reversing the decision of the lower court and remanding the case for *the entry of a proper judgment* in accordance with the views expressed by the Supreme Court.

The record does not show that a final judgment has been entered in the lower court pursuant to the decree of the Supreme Court of the State, and manifestly, until such judgment is entered *correctly* by the district court, there is no *final* judgment in the cause.

The mere reversal of the judgment of a lower court by the highest State tribunal is not such a *final* judgment as will bring the cause within the jurisdiction of this court. McCombs *vs.* Commissioners, 91 U. S., p. 1, 94 U.S. 514.

In Young *vs.* Emslie, No. 170, on the docket of the present term of this court, decided January 19th, 1885, in error from the Supreme Court of Kansas, the judgment of said court was as follows: "It is ordered and adjudged that the judgment of the court below be reversed and the cause remanded for further proceedings, in accordance with the views of the court, as expressed in its written opinion filed herein."

In legal effect, this was precisely the same judgment as that

endered by the Supreme Court of California in the present case.

In that case, as in this, the case was reversed and remanded to the lower court, with directions to enter judgment in accordance with the opinion of Supreme Court.

In that case, as in this, the record failed to show that a final judgment had been entered by the lower court, whereupon this court made the following order, to wit: "It appearing to the court that the record does not show that a final judgment has been entered in the lower court, it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby dismissed with costs."

It is submitted that this decision is directly in point, and that this case should be dismissed.

Respectfully submitted,

M. D. BRAINARD.
JAMES K. REDINGTON.
Counsel for Defendants in Error.

116380

Supreme Court of the United States.

OCTOBER TERM, 1885.

B. W. MOWER,
Plaintiff in Error,
vs.
NATHAN FLETCHER and JOHN D. BICKNELL.

No. 103.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

EDWIN BAXTER, Los Angeles, Cal.
WM. J. JOHNSTON, Washington, D. C.
Attorneys and Counsel for Plaintiff in Error.
U. J. BAXTER,
of Counsel.

WASHINGTON, D. C.
U. S. GAZETTE PRINT, 719 Market Space.
1885.

Supreme Court of the United States.

October Term, 1885.

B. W. MOWER, *Plaintiff in Error*,
vs.
NATHAN FLETCHER AND
JOHN D. BICKNELL.
} No. 103.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFF IN ERROR.

EDWIN BAXTER, Los Angeles, California, and WM. J. JOHNSTON, Washington, D. C., Attorneys and Counsel for Plaintiff in Error; U. J. BAXTER, of Counsel.

STATEMENT.

The complaint filed in this suit as commencement of action styles it an "action to quiet title."

The Supreme Court of California treats it as an action of ejectment, claiming that it is immaterial under which name or style it is classed, as, under the California codes and system of pleading, the same defenses, legal and equitable, can be interposed in either action.

But we insist that this is error. The action below was in no sense an ejectment suit, but an equitable action to "quiet title" and for "the removal of a cloud;" as will fully appear by the pleadings and prayers for relief; and in such case *title must be shown* in the party instituting the suit.

It is not a mere action for possession, setting up wrongful entry and praying for account and damages, but the plaintiffs below set up in their own pleadings the alleged adverse claims of interest and title in defendant, call upon court to compel a disclosure of such interest and title, on the part of defendant, and conclude with a distinct prayer for "such other and further relief as to *equity* shall seem meet."

This is that case where the plaintiffs, having deliberately *chosen* the equitable pleadings and form of attack, they must be held to strictness in the prosecution—and cannot shift upon the defendant the technical burden of proving title in himself, or disproving theirs ; but must show their own complete title or fail in their suit.

They, in other words, occupy toward this case the position assigned to the defendant in Quinby *vs.* Conlan (104 U. S., 420,) wherein the action was ejectment and the party attacked interposed the equitable defense, and wherein such equitable defense was considered as first entitled to be examined and disposed of. Here the equitable nature of the complaint itself is in the same manner, "first to be disposed of by the court before the legal remedy is considered." And it must be disposed of as presented

by the prayer of the plaintiffs—being in equity—and not be used as a presumption against the defendant (plaintiff in error in this suit.)

The complaint (fol. 1, 4, Record) alleges that plaintiffs below are the owners of the premises (lands) in controversy. That the defendant (plaintiff in error) wrongfully and unlawfully entered into possession of a *portion* of the land, and is now in possession thereof, and holds the same unlawfully and against right.

That the defendant claims an interest or interests adverse to the plaintiffs, without right, and that he has no right, title or interest in the land.

Prays that all adverse claims may be adjudicated and plaintiffs may be declared the owner, and defendant be debarred from asserting any right, &c.

Defendant's answer denies plaintiffs' title. Denies wrongful or unlawful entry or possession. For separate answers alleges :

1st. That plaintiffs claim, under one E. W. Squires, whose claim of title springs from certain proceedings to obtain title from the State of California, which were illegal and resulted in a void patent.

2d. That defendant (below) is himself entitled to possession and to the title by virtue of certain proceedings to obtain title under the pre-emption laws of the United States, and that his claim is still pending in the Land Department of the United States. Admits and asserts possession of the land for three years under and by virtue of his pre-emption claim, and alleges the land is public land of the United States.

Prays that claim of plaintiffs be declared invalid. That defendant be declared the owner of the land by virtue of his compliance with the pre-emption laws, and plaintiffs be restrained from molesting his possession and ownership.

The action was instituted in the District Court of Los Angeles County, State of California. (fols. 4, 6, Record.)

Trial was had by the court without a jury, and judgment rendered for the defendant as prayed.

The District Court found for the defendant on all the issues presented.

The plaintiffs prepared a "statement" of the case including all the material evidence, rulings, etc., and moved for a new trial.

The motion was denied.

Plaintiffs appealed to the Supreme Court of the State of California from the judgment and the order denying the motion for a new trial.

The appeal removed the whole Record, including the evidence to the State Supreme Court, which court reversed the judgment of the District Court, and gave judgment for the plaintiffs, as prayed.

The defendant, Mower, removed the case to this court by writ of error which brings up the whole Record.

The plaintiff in error makes the following

ASSIGNMENTS OF ERROR.

Said Supreme Court of the State of California erred:

I.

In deciding that said defendants in error were

entitled to the possession of the land in controversy, as against the said plaintiff in error.

II.

In deciding that said defendants in error (plaintiffs below) had any legal or equitable right to the possession of said lands and premises, as against the United States, or against the plaintiff in error (defendant below,) claiming under the United States by virtue of the U. S. pre-emption laws, and an entry thereunder and compliance with the same as an actual settler upon such land.

III.

In deciding that defendant in said court, plaintiff in error here, was a mere naked intruder as against said plaintiffs below.

IV.

In assuming by such decision that said defendant in said court was not entitled to the possession of said land by virtue of his proceedings under and compliance with the pre-emption laws of the United States, and his offered payment for such land, which, although refused by the U. S. Land Officers was equivalent to payment therefor.

V.

In assuming by said decision that said plaintiffs below had acquired any right to the possession of said land by their pretended title, derived through or from one E. W. Squires, and his possession thereof, or by any other means or proceedings.

VI.

And plaintiff in error alleges that said decision and judgment of said Supreme Court of California are unjust, inequitable and not according to law.

POINTS AND ARGUMENT.

The land here in controversy is the same identical parcel, the history and title of which are given in our brief in the case of Mower *vs.* Fletcher, No. 102, just submitted in this court, namely, the S. E. ¼ of N. W. ¼, the E. ½ of the S. W. ¼ of the N. W. ¼, and N. ½ of S. W. ¼ of Section 32, T. 2S., R. 13W., San Ber. Mer. containing 140 acres, more or less. The 20 acres there involved, with the 140 acres at bar, comprised the 160 acres "taken in lieu of S. E.¼ of Sec. 36, T. 4S., R. 4W., S. B. M."

The evidence shown in this Record in regard to the title and possession of the parties is the same as in that case, except that the State patent is exhibited here, and in that case admitted.

In this case the defendant below denies the plaintiffs' title and asserts his own, and the trial court found in his favor.

The court in this case failed to include in its finding that the title of Fletcher (and Bicknell) was void by reason of the land for which it was taken in lieu not being "lost" but "in place," and the property of the State of California. But as the whole Record is here, and this fact appears, and is uncontroverted, and will of itself sustain the judgment of the court below, (District Court,) this court will, on the whole case, enter the proper decree as equity requires, even if the reasons assigned by the trial court for its judgment be deemed insufficient.

The undisputed evidence in this case shows:

That the title of plaintiffs below rests wholly upon a patent issued by the State of California, upon ap-

plication of one E. W. Squires, claiming to proceed under the acts of Congress of March 3, 1853, and July 23, 1866. The land in controversy was selected in lieu of a parcel of a thirty-sixth section, surveyed in 1856, approved and the plat filed in 1857, and shown thereon to be "in place," and never included in any adverse claim whatever. (Record, fols. 28, 31, 33, 34, and 46.)

It was also shown and is in the Record, undisputed, that always previous to the month of February, 1868, (and the trial court found until October 31, 1871,) this disputed tract, the subject of this suit, was included within the undefined limits of the Rancho Sausal Redondo, a private Mexican grant, and therefore, (as this court has often held) not subject to selection or entry. This court at last term in the O'Connor cases fixed the month of February, 1868, by the Hansen survey, as the time when this reservation expired.

It is shown by E. W. Squires, (and not disputed nor questioned,) that he entered into possession of this tract in 1859, and before the end of 1860 he had put on all the substantial improvements that were on the land when Mower took possession in 1876, or December, 1875. (Record, fol. 19.)

On any hypothesis Squires was a mere trespasser until 1868.

Mower entered in December, 1875, upon 20 acres of the land afterward claimed by him as a pre-emptor. This was the 20 acres involved in case No. 102, and is excepted from the description here. He had contracted with Fletcher to purchase the 20 acres, but

on finding, (as he believed, and as is the fact,) that Fletcher had no title, he, in 1876, took proceedings to obtain title from the paramount source, (the United States,) to the whole 160 acres. (Record, fols. 20, 21.)

It is not questioned (and the court found) that if the land was then subject to pre-emption his compliance with the law is such as to entitle him to all the rights and privileges of the pre-emption laws. (Record, fols. 8, 13, 21.) His possession necessarily included the permanent improvements placed thereon by Squires.

This action, whether of ejectment or to quiet title, was brought by plaintiffs out of possession against the defendant in possession.

To recover, even in ejectment, said plaintiffs must show title or other right to possession in themselves. Otherwise their suit fails, regardless of any question of defendant's title.

Hastings *vs.* Develin, 40 Cal., 363;
City of San Diego *vs.* Allison, 46 Cal., 162;
Nix *vs.* Allen, (112 U. S. 129.)

They introduced a patent from the State and rested.

Defendant attacked this patent, showed that the State had acquired no title, and never had a valid title to the land described, by reason of the fact that through a fraud initiated by the very party at whose instigation the State had assumed to obtain it, no title had passed. That the land in lieu of which it had been listed to the State was a parcel definitely surveyed, marked, granted and transferred to the State, and the transfer plainly of record. The S. E.

¼ of Sec. 36, T. 4S. R., 4W., was "in place," never within a private grant or claim, nor "lost" to the State. In fact, that the listing to the State was utterly without the authority of law, therefore absolutely void. And the land here in dispute still belongs to the United States, so far as concerns the State of California or its grantees.

This whole title or claim of title rested from its inception upon a proceeding entirely unauthorized by law. Squires made an application to the State authorities for the land in dispute, alleging it was taken in lieu of a certain parcel he specifically describes as "included in a private grant;" and this description and allegation are repeated at every step of the proceedings to the issuing of the patent, including the

(Page 8)

In Newhall vs. Sanger (92 U.S. 761) the action was to "quiet title" and the patent had issued to the railroad company. It was declared void and a subsequent patent issued to a settler was sustained; thus establishing (1), That the plaintiff in such action must rely on the strength of his own title; and (2), That a right of entry under the public land laws existed notwithstanding such void patent.

More than this: On such an application, it was, by the act of 1866, made the duty of the State officers to

apply to the United States Surveyor General to furnish lists, or to examine the lists furnished by that officer, and only select in lieu of such lands as were duly certified to have been lost to the State.

The Surveyor General certifies that no such list, including the land taken for a basis, was filed—and for the very good reason that it could not be, if the list were correct.

There was, then, absolutely no basis for this selection, nor any certification of such basis by the U. S. Surveyor General.

Squires applied to the State authorities to grant him a parcel of land belonging to the United States. The United States had granted to the State certain specific sections; that is, *all* 16th and 36th sections; or in case the U. S. did not own any particular one of these sections, this fact, when ascertained, should be the basis for which another equivalent section should be selected from the public lands of the United States.

Instead of so selecting in lieu of such section lost, this applicant selects a piece of land and asks that the State procure title in lieu of a parcel of her own land, definitely located, surveyed and described—as much her property in fee as if conveyed by individual particular description by the act of Congress.

The fraud succeeded so far as to deceive the officers of the Land Department, and secure the listing of the land selected as lieu. There being no basis for such selection, the acts of these officers were without authority of law, and utterly void.

A grant from the State is void where the State had no property in the land granted, or where the officers had no power to receive the entry and issue the grant. Curle, *vs.* Barrell, 2 Sneed, 63.

As we have said, this title, or alleged title, was obtained by fraud, and against law. "No title can be held valid which has been acquired against law." "Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent."

Stoddard *vs.* Chambers, 2 How., 284.

Patent only conveys legal title when authorized or confirmed by Congress. Ib.

Grignon's lessees *vs.* Astor *et al* 2 How., 319;
Patterson *vs.* Winn, 11 Wheat., 380;
Grogan *vs.* Knight, 27 Cal., 516;
Middleton *vs.* Low, 30 Cal., 596;
Rosecrans *vs.* Douglass, 52 Cal., 213;
Cornwall *vs.* Culver, 16 Cal., 424.
Kile *vs.* Tubbs, 23 Cal., 442, (same, 59 Cal., 191;)
Polk's lessees *vs.* Wendell, 9 Cranch, 87;
James *vs.* Campbell, 104 U. S., 371;
Doll *vs.* Meador, 16 Cal., 295, (331,) and cases cited;
O'Brien *vs.* Perry, 1 Blk., 132;
Minter *vs.* Crommelin, 18 How., 87;
Moore *vs.* Robbins, 96 U. S., 53;
Seymour *vs.* Osborn, 11 Wall, 516.

These decisions would appear to be sufficient to establish the point that in this case, there being no authority of law for any selection whatever by the State, the act of selection was void, and the acts of

the United States officers in permitting such selection and certifying the land to the State thereupon, were equally so.

In the recent case of Frasher *et al. vs.* O'Connor, (115 U. S., 102) this court held that: "The only questions for consideration by the officers of the general Government are, whether the State possessed the right to claim the land under her grant, and whether the land was subject to selection by her agents." (Syllabus.) That was a case involving lands within the same private claim (Sausal Redondo) as in this, and it was found that upon both "questions" thus stated by the court, the affirmative was true. We have the facts here in this record that in the first or main proposition—the essential basis of right in the State—the reverse is true. She did *not* possess the *right* to *claim* the land under any grant whatever. The act of selection has no basis, and being ostensibly "in lieu" of loss sustained under such existing right to claim land, has nothing to stand upon, and is necessarily *void*. Could the court have found either condition wanting, and have sustained the title in that case? We need not suggest that such conclusion would be impossible. Certainly the first condition cannot be waived. Both must concur; and the second is dependent as regards authority purely upon the first—the subjectiveness of land to selection, or any other disposal, being one of status, merely, and not necessarily involving the question of authority.

But it is said that the listing or certification of the land has the force and effect of a patent, and con-

veyed perfect title. To this it may be replied, that patent itself does *not* convey perfect title if executed without authority of law; and granting that the list has the force and effect of a patent, it may, if void for want of authority, be so declared in a court of law, upon a collateral assault, and does not require a direct suit by the Government to vacate it. To this effect are all the authorities.

> Smelting Company *vs.* Kemp, 104 U. S., 636, and cases there cited. Also Stoddard *vs.* Chambers, 2 How. 284, and other cases cited in this brief.

This certification, in our judgment, is but the vesting of the title by the act of May 20, 1826, (4 Stat. 179,) being a holding "by the same tenure, and upon the same terms for the support of schools * * * as section number sixteen (or thirty-six) is or may be held" by the State to which the grant is made. True, the act of March 3, 1853, (10 Stat., 244,) gives authority to the State to select the lieu lands agreeably to the provisions of the act of 1826, just cited, instead of the Secretary of the Treasury (Interior. But this act also requires the approval of such selection by the Secretary of the Interior, and it is to be presumed that the title then vested in the same manner, and "agreeably to the provisions of" the said original act, as before recited. Because all this legislation was anterior to the passage of the act of March 3, 1854, (10 Stat., 346,) now section 2449 Revised Statutes, giving efficacy to lists furnished by the Commissioner of the General Land Office; and title had, theretofore,

always been conceded to pass for indemnity school lands, by virtue of the grant contained in the legislative provision. Such selections were individual selections, and not lists of selection, and were listed by the General Land Office for submission to the Secretary for approval, merely as a matter of convenience.

But if, as intimated in the O'Connor cases, the title to these lands rests upon the statute of 1854, the fee simple of the same only passed to such lands as "are of the character contemplated by such act of Congress, and intended to be granted thereby," *i. e.* by the act of Congress giving the right to have such list. "But where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void"—*i. e. void absolutely*—"and no right, title, claim or interest shall be conveyed thereby." What is this but an express declaration of a condition tacitly lying in all conveyances, that where there is no right or authority of law there is no title; that the instrument is *void*, and conveys no claim or interest?

And if it be express, to the effect that the same is "*perfectly* null and void," who is bound to observe the form of a nugatory instrument? And why shall not this court give effect to this negative declaration of express law, as well as to the affirmative confirmation which precedes it, when the lands are shown to fall within the negative, and excluded from the

positive condition of the law? It is a statute to be read and enforced according to its express language, like all others, and unless there be doubt, no resort can be had to construction, nor can it be emasculated by omission of its plain words.

We are aware that this statute is perhaps unnecessary to this case; but, as it has been incorporated as in some sort a foundation for the late decision respecting lands situated in one important regard precisely like that in this suit, although differing, as we contend, in the most fundamental point, we have thought advisable to notice its general bearing and import.

But it is claimed that the plaintiffs had obtained a right of possession, and had improved the land, and the defendant was an intruder, a trespasser. Was he? and had the plaintiffs any right of possession? If they had such right when did it accrue, and how?

They (by their grantor Squires) entered upon the land in 1859. The land was then undisputably within the limits of the Mexican grant, Sausal Redondo, and so remained until February, 1868. This is not questioned. During all this time he could gain no right to title or possession, either as against the United States or the owners or claimants of the grant. This has been regarded as settled by a long series of decisions both of the California Supreme Court and of this court. He was a mere trespasser without any shadow of right or equity.

Kile *vs.* Tubbs, 28 Cal., 402;
Rich *vs.* Maples, 33 Cal., 102;
Ferris *vs.* Coover, 10 Cal., 589;
Huff *vs.* Doyle, 50 Cal., 16, and 93 U. S., 558;
Van Reynegan *vs.* Bolton, 95 U. S., 33, and cases cited;
C. P. R. R. *vs.* Robinson, 49 Cal., 446.

During this time all the valuable improvements, so much magnified in the court below, were placed on the land.

When this land was finally excluded from the said grant, by survey (whether in 1868 or 1871) these improvements were the absolute property of the United States, subject not even to an equitable claim.

No proceedings, not a single step had been taken by Squires to acquire title, either from the United States or from the owner of the grant. Squires then stood in the ordinary place of a trespasser without right, who did not and could not gain any title to or interest in the soil, nor anything attached thereto; but was at any time liable to an action of trespass. But his improvements attached to the soil became the exclusive property of the owner of the soil.

Ferris *vs.* Coover, 10 Cal., 589, (See page 632, top.)

If a person can exclude from sale or appropriation under United States laws, 160 acres by entering upon it and making improvements without one legal step towards acquiring title, then why not a whole section, township or more?

Did he gain a right to the possession by his proceedings to purchase the same from the State?

Clearly he did not.

The trial court found that this identical land in controversy was not excluded from the grant Sausal Redondo, until October, 1871. This court having fixed the segregation as finally made in February, 1868, we pass this point. It is not necessary to our case.

Assuming that this land was public land of the United States when Squires applied to the State for it, and saying nothing of the regularity of his proceedings as between himself and the State (the State making no objections) to select and obtain title. Squires gained neither right of possession nor title by such proceedings.

We have already shown that his patent was void and conveyed no title, because the grantor neither had nor could have title.

Squires gained no right to possession. He might, if an actual settler on the land, have had prior rights as a pre-emptor or as a homestead claimant. But we can neither assume nor admit such right; as he has asserted no such claim, and never, by word or act, evinced any such intention.

His application to the State was fraudulent in its inception. The very first paper stated a falsehood, and a simple glance at the public record would have revealed the fraud.

Certainly he could gain no right by fraud.

Stoddard *vs.* Chambers, supra.

If this application and proceedings thereunder gave him either claim of title or possessory rights,

he might have followed by another or any number of applications, and at the foot of each one stated, "Taken in lieu of the S. E. ¼ of Sec. 4, T. 4S. R. 4W., which is included in a private grant."

He might have made four selections for this one parcel, falsely asserting it was "lost," though in fact it plainly appeared of record not lost, but *surveyed*, and "in place," and have claimed title or right of possession of each of the four quarter sections so applied for, as well as the one. A location, a certificate, a patent, or four patents for the four, would have been as valid as for the one. For the first as well as the supposed other three was without any authority of law, and absolutely void.

If such proceedings reserve the public lands of the United States from settlement under its laws, one-half or three-fourths, or even all the public domain of the United States might be so appropriated and withdrawn from sale and from legal settlement.

The proposition is absurd on its face.

If Squires or his grantees did not gain title or right of possession by this selection in 1868 (as we have shown they did not) when did they gain it? Certainly not by any confirmation by act of 1866. That act did not confirm such void selections, and only acted upon selections previously made. It had no prospective effect.

Grignon's Lessee *vs.* Astor, 2 How, 379.

The act of March 1st 1877 (Booth Bill) had not been passed when defendant settled—but of this we will discuss presently.

The plaintiffs and their grantors, then, had no rights, title, or right to possession, in December 1875, when defendant Mower (plaintiff in error here) entered upon the land as a pre-emptor, nor in January 1876, when he claimed under U. S. laws.

It is conceded without question, that if this land was public land, not rightfully (as against Mower) occupied or claimed by any other, Mower has done all that is necessary to entitle him to the possession and to a patent of the United States.

But we are told, and the California Supreme Court decided, that Mower was a trespasser, because he entered upon the possessions and valuable improvements of plaintiff Fletcher. And further that he gained possession by a contract to purchase of Fletcher.

His contract was in fact for 20 acres of the 160, being the portion not included in this suit.

But we have shown that neither Fletcher nor his grantors had any rightful possession as against the true owner, the United States, or any party in privity therewith who properly represents such true owner, or paramount source of title.

We have also shown that the improvements appurtenant or attached to the soil, placed thereon by a mere trespasser, belong to the owner of the soil, and they cannot be detached either theoretically or actually.

Therefore neither the plaintiffs Fletcher and Bicknell nor their grantors, had either title or right to the possession of such improvements when defendant Mower entered. Their possession was tortuous. They

were mere intruders—trespassers, there by sufferance and only such sufferance as trespassers gain—having no rights or equities as against the paramount owner, the United States and its grantees.

Ferris *vs.* Coover, 10 Cal., 589.

We see no tenable ground to question the right of Mower, who has unmistakably connected himself with the paramount source of title, to enter upon and successfully dispute both the title and possession of the plaintiffs, who are mere trespassers without right.

C. P. R. R. *vs.* Robinson, 49 Cal., 446;
Huff *vs.* Doyle, 5 Cal., 16, s. c. 93 U. S. 558;
Rosecrans *vs.* Douglass 52 Cal., 216;
Kile *vs.* Tubbs 23 Cal., 332;
Kile *vs.* Tubbs, 28 Cal., 403;
Mahoney *vs.* Van Winkle, 33 Cal., 448;
Terry *vs.* Megale, 24 Cal., 610.

Even if Mower gained possession by his contract to purchase a portion of the tract claimed by him, he is not thereby concluded or estopped to deny his vendor's title. He did not enter as a tenant, but on agreement to buy *the title.*

Finding his vendor, or promised vendor, had not the title he was seeking, he is not estopped to dispute and show the same void, and buy of, and maintain possession under, the true owner, against his fraudulent pretended vendor.

Fletcher *vs.* Button, 4 Comst., N. Y. 396.

Most certainly it would be a strange doctrine if a thief sells to me a piece of stolen goods, for which I agree to pay him, and I discover the theft and buy

of the true owner, I am estopped to deny the title of the thief, or that I cannot maintain possession against him because I have obtained the real title elsewhere.

Saying nothing of criminal intent (which has nothing to do with our position) the cases are parallel.

Equally true, if a stranger to the title, having no color of right, is found upon a piece of land—no matter of difference whether he has been an hour or a year in possession—and contracts to sell the same, giving his vendee the possession (as against him) it would be preposterous to contend that his vendee might not buy of the owner of the soil and maintain possession as against the stranger, without payment for or redelivery of his false muniment of title. This is the case before us.

Morrison *vs.* Wilson, 13 Cal., 494;
Arguello *vs.* Bours, 8 Pacific Reporter, 249 (Cal. Sup. Ct. Sept. 21, 1885.)

The actual possession of the one hundred and forty acres involved in this suit was also peaceably gained, as shown by the record, to wit: By removal from the twenty acres specified in the contract to purchase, to a portion of this one hundred and forty acres, abandoned by one J. C. McCollum, a grantee of Fletcher by deed, whose abandonment is proved by his own testimony in this case; also the fact that he conceded the invalidity of the Fletcher title, and made no objection to the removal of Mower upon the land. (Record, fol. 22.)

By this showing McCollum held the State title by deed as to at least sixty acres upon which Mower

moved. Fletcher held only a mortgage therefor, which by the State law is a mere lien and no title: and Mower, moving upon the land without objection from the only person having the form of legal title under the State, after the abandonment of such person, (by which abandonment and by his own declaration that "he became satisfied that he had no title to the land by this deed from Fletcher, and he did not intend to spend any more money on it," it was conceded to be public land and the deed void,) we say, Mower was no trespasser and did not enter without authority upon the title and improvement of Fletcher.

This being the only possession disputed, and claimed to be trespass, (and the only point decided against him by the Supreme Court of California,) we assume that as to the other eighty acres it was not forcible, not a trespass, and not within the application of Atherton *vs.* Fowler, (96 U. S., 513.)

We say this without regard to the stipulations as to title and possession of the plaintiffs below and their grantors, (Record, fols. 18 and 20,) because this evidence was introduced without objection, and the true facts are drawn from Mower on cross-examination by plaintiffs (fol. 22) to the effect that McCollum claimed under Fletcher; and McCollum swears he had Fletcher's deed; so that the title and possession were not those of "plaintiffs and their *grantors*," but the title and possession of a *grantee*, viz: McCollum, who abandoned.

The stipulation cannot control and dispute the proven facts, but effect must be given to the whole

record, and apparent discrepancies reconciled and explained according to the very right and justice of the case, the plaintiffs themselves having resorted to an equitable suit for relief.

The title and possession being in McCollum, he had a right to abandon. Mower was not his grantee. but a settler in his own right. A foreclosure under the mortgage would not affect Mower who had no privity. Enforcement of the lien and recovery against McCollum, or a reconveyance by him to Fletcher, if such were had, could not displace the competent abandonment to the United States and Mower's assertion of a proper claim under her laws. No authorities need be cited upon this proposition. It is elementary law. He, Mower, was not therefore "a mere naked intruder" as found by the State Supreme Court. There was no "forcible" possession.

With further reference to the cases of Atherton *vs.* Fowler, (*supra*) and Hosmer *vs.* Wallace, (97 U. S., 781) relied on by plaintiffs (below) in support of their allegation, that defendant Mower was a trespasser, careful examination shows that neither of these supports their position.

In the first the claimant whose possession was upheld was a purchaser of a title under a grant from the government or governor of Mexico, granted before the United States came into possession by treaty: a grant that had been universally believed good, and to test which resort must be had to the laws and customs of a foreign government, written in a foreign tongue. A title which even in this court was not shown, after careful research, to be

so foundationless as to secure the opinions of the whole bench against it. There was good ground for an ordinary man without negligence to have considered it good.

In the second case (97 U. S., 781) the land was clearly reserved when the person pronounced by this court a trespasser entered upon it, and the prior possessor had an undoubted right to its possession.

The case at bar is different. From its very inception both the possession and the attempt to secure title were fraudulent, and the evidence was patent and of record, so clear a child could understand it:

1st. That in 1859 and until 1868, the plaintiffs' grantor (Squires) was a trespasser, and

2d. Still more clear—the record staring him in the face—that there was no basis presented on which the State could (on his request) obtain the title.

Both as to improvements and title he falls under the language of the court, in 10 California (Ferris *vs.* Coover,) at p. 632.

But we are told the act of March 1, 1877, (19 Stat. 267,) has been passed, and the title of Squires, Fletcher and Bicknell is confirmed by that act.

It certainly did not confirm the title.

It is matter of public notoriety and administrative history that in 1876, prior to Mower's assertion of a pre-emption claim and the repudiation of his contract with Fletcher, great excitement existed respecting the insecurity of title asserted under these indemnity selections and certifications. Ascertaining the want of regularity in the proceedings, settlers who held the State titles were alarmed, and in many cases

abandoned their lands, which were immediately claimed by others as public lands under the pre-emption laws. The Interior Department sustained many of these claims, and held the title of the State invalid. Resort was finally had to Congress, resulting, after strenuous opposition in the passage of the act named, and against even greater remonstrance, it was approved by the President.

The first section confirms the title to lands selected prematurely—that is before final survey—in lieu of lands lying within Mexican grants. This selection is not covered by that provision.

The second section makes like confirmation of lands thus prematurely selected in lieu of lands which may on future survey fall without such grants, but provides that upon such exclusion the 16th and 36th sections used as a basis shall fall to the United States, and be disposed of as other public lands. Nor does this provision confirm the selections here in question.

No lands are confirmed to the State by either of the foregoing provisions, except such as are selected in lieu of lands within exterior limits of Mexican grants—those remaining permanently in such limits being thus lost to the State, and those which shall be excluded becoming the property of the United States, because of the lieu selection being already confirmed. The phrase, "or are otherwise defective or invalid," has been construed by the Attorney General and accepted by the State authorities as simply "intended to confirm to the State in spite of any defects or invalidities which have existed in its selec-

tions, *other than the defect arising from the fact that there was no original basis for the selection*," (16 op. 69.) That is, where, in addition to the fact that there had been no final survey of the Mexican grant embracing the "basis of selection," there must have been some other defect or invalidity—as "where a selection made by the State was of land then in reserve." See Syllabus. And on page 72: "The words, 'or are otherwise defective or invalid,' clearly point to defects *different* from those which have arisen by reason of the fact that there had been no loss of lands in lieu of which selections were made. And to judge from the correspondence connected with your letter the *defect which has most generally occurred* has been, by reason of the *selection of property of the United States*, which at that time *was in reserve*."

Here follows what was relied on, and misapplied, by the Supreme Court of California in the preceding case, to which we invite attention, namely, that "it was entirely competent for the United States as between it and the State of California to grant this;" meaning, to grant lands in lieu of lands actually lost where the same had been taken on reserved lands, "the property of the United States," and not intending to say that a new grant was made in lieu of lands not lost and which were already the absolute property of the State of California. Evidently the court below had in mind only the alleged defect arising from the claimed reservation of Sausal Redondo, and entirely ignored the other irremediable defect of a want of basis for any selection at all.

And the Attorney General in his opinion expressly provides against this possible misconstruction; for in immediate connection (p. 73,) he says: "Of course it is to be understood in this connection, that where there was no sixteenth or thirty-sixth section, which is the case covered by the first proviso of the second section, no title can pass to the land thus selected, and such intention is clearly indicated by the proviso."

This view is further enforced by what is said respecting double indemnity for a single loss:

As "in certain cases two or more selections have been made in lieu of the same sixteenth or thirty-sixth section of land, I ought to add that I do not by this opinion intend to imply that the State is entitled to more than one selection in lieu of any one section." Further discussing the act, he says, "there is nothing in it from which it can fairly be inferred that where double selections are made, they were to be ratified, or that the State was by reason of any mistake in the making of duplicate selections *to obtain a greater quantity of land than had originally been allowed by law for school purposes.*"

Cases of this character, where the land was already surveyed and in place as a sixteenth or thirty-sixth section prior to attempted selection in lieu thereof, or even prior to the passage of the act of 1877, must be held as exactly covered by the language of the proviso to the second section, namely, "if there be no such sixteenth or thirty-sixth section." The language is not "if there be *no* sixteenth or thirty-sixth," but "if there be no *such* sixteenth or thirty-sixth"—that is no sixteenth or thirty-sixth section within the

limits of a Mexican grant, which may be finally excluded, and on which the United States by this law may re-enter, resume its original title and dispose of as "*other* public lands." This has been the construction of the Land Department, and accepted by the State and her grantees.

Watson *vs.* State, (Copp's Public Land Laws, 1882, Vol. 2, 1145;)
Jackson *vs.* State, *ibid*, 1150;
Abila *vs.* State, *ibid*, 1154;
Ketchum *vs.* State, *ibid*, 1156, 1157;

(Instructions of Department, November 22, 1880.)

Parties holding State patents under certifications of this identical class are constantly applying to the General Land Office for vacation of the certification, and consummation of title by payment of the Government price of the land under said proviso.

Hence it may be claimed that the plaintiffs below have the right to purchase under the second section of the act of 1877, as "innocent purchasers for a valuable consideration."

It is a sufficient answer to this that this action was commenced in April, 1879, more than two years after the approval of the act of March 1, 1877, and it is not claimed in the pleadings or evidence, nor even hinted that such offer to purchase has been made.

We may, however, state that we are advised, and the records of the Interior Department show that the defendants in error have, since the judgment below, applied to make such purchase; thus showing their own acceptance of the Departmental and State con-

struction of the act as recited above. And were this fact properly in the record and consequently within the jurisdiction of the court here, we should insist, with the most convincing assurance, that this concession is vital; that it is a controlling admission that the land is public land, was never the property of the State, and that the reputed title set up in this action is absolutely invalid. It amounts to complete estoppel.

But Mower had already succeeded to all the rights of the United States when this act of 1877 was passed. Therefore *this* land was removed from the operation of that act. The United States could not grant *de novo* land belonging to another party.

The Attorney General of the United States in the opinion above referred to says that where, "there was no original basis for the selection," "a confirmation can only be interpreted as a grant *de novo*." The same is true of the condition contained in the proviso.

And the Secretary of the Interior in above cited letter of November 22, 1880, expressly says of lands selected in place of sixteenth and thirty-sixth sections surveyed and in place and therefore already passed to the State: "Thus, it appears that this class of selections gets no confirmation, either by act of 1866 or 1877." It falls within the condition.

This is the only tenable, legal or reasonable conclusion that can be adopted.

It makes no difference what dealings were had with strangers to the title, nor what was done without authority of law, or by fraud, either in fact or in law. Such acts are void.

The plaintiffs below, nor their grantors had not, by a single act done by authority of law, put themselves in privity, or connected themselves in any manner, with the paramount source of title. Neither had the State of California.

When he settled upon and applied for this land, and any time after the State had issued its patent to Squires, or at any time or on any day after the final survey of the Rancho, Sausal Redondo, the United States government or its grantee, or one in privity or entitled to the land as public land under the U. S. laws, could have maintained ejectment against Squires or his grantees, even in California courts, where both legal and equitable defenses can be made. And if the United States was the owner and entitled to possession, then Mower was, before the passage of the act of 1877. The right had become vested, and it was beyond the power of Congress to dispose of the title. It was already disposed of.

Besides there could be no *bona-fide* purchaser, where the title purchased did not exist, and where on the face of the proceedings a patent has been procured by fraud. Neither is it *claimed* these plaintiffs are bona-fide purchasers (without notice) of, or have paid any consideration for the Squires title.

The act of March 1, 1877 gives the right to purchase only to bona-fide purchasers of a State title acquired under previous acts.

A bona-fide purchaser is a purchaser without notice of the invalidity or defect of title. If the plaintiffs below were such they should have alleged and proved it, We have shown they did not. As it is

their only chance to maintain even a right of possession (providing the State or their grantors had any title at all) they should have shown it as to bona-fides and notice.

Veaux *vs.* Forbeuder, 24 N. W., Reporter 790; (Supreme Court of Mich., September 29, 1885)
Hough *vs.* Dickinson, Ib. p 809.

So far as these plaintiffs below are concerned, on its face it appears like a speculating venture.

The third section of the act of 1877 does not apply.

Let it be borne in mind at every stage that it was known (legally) by Squires, the applicant for the patent and beneficiary thereunder, from the very incipiency of his application, that this selection was fraudulent, illegal and void. That there was no basis for the selection. That the State had already full title to the land represented as "included in a private grant" and therefore could not legally obtain title for land in its place.

And so far as the record shows *these plaintiffs* have been from the very first fully advised of all these facts.

They have shown no title nor right to possession as against the United States or its privies, and no equities.

Their case must fail whether Mower is the owner legal or equitable, or not.

Finally:

The suit of the plaintiffs below must fail, Because:

Their alleged title oiginated in fraud and is void ;

Their patent was procured without authority of law and is void ;

They have no legal title;

They have shown no equities:

They have shown no right to the possession:

They were trespassers from the beginning;

The United States has never parted with the title:

But,

Mower has settled upon land not reserved or in possession of any legal occupant:

He has fully complied with all the requirements of the pre-emption laws entitling him to a patent, and full title to the land;

He is therefore entitled to the possession.

The plaintiffs below have not shown themselves bona-fide purchasers even of a void title;

They are mere adventurers.

EDWIN BAXTER, Los Angeles, Cal.,
W. J. JOHNSTON, Washington, D. C.
Attorneys and Counsel for plaintiff in error.

U. J. BAXTER,
Of Counsel.

116-380

DEC 16 1885
CLERK

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER and JOHN D. BICKNELL,
Defendants in Error.
} No. 103.

In Error to the Supreme Court of the State of California.

BRIEF FOR DEFENDANTS IN ERROR.

M. D. BRAINARD,
JAMES K. REDINGTON,
Counsel for Defendant in Error.

WASHINGTON, D. C.:
PRINTED BY J. S. TOMLINSON,
No. 632 F Street, N. W.,
1885.

Supreme Court of the United States.

OCTOBER TERM, 1885.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER and JOHN D. BICKNELL,
Defendants in Error.
} No. 103.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The complaint in the action was entitled "a complaint to quiet title." It contained all the material allegations of a complaint in ejectment, however, and was treated as such by the court. (Folios 2–4, 53.)

The plaintiff, through mesne conveyances, claimed title under a patent from the State of California, to one E. W. Squires, dated March 31, 1873, founded upon an application by Squires to the State to purchase the lands, as school indemnity, a location by the State agent, and a listing of the same to the State by the Commissioner of the General Land Office and Secretary of the Interior. (Folios 10, 15 to 19, inclusive.) They also relied upon an uninterrupted exclusive occupation and possession, through themselves and their grantors, from 1860 to 1877, when the defendant, Mower, entered upon the tract under the circumstances hereinafter described. (Folio 20.)

The defendant, Mower, claims under the pre-emption law, and not otherwise. In December, 1875, he entered upon a twenty-acre tract, lying north and west of the premises in controversy, under an agreement to purchase the same from Fletcher, one of the plaintiffs. In March, 1876, he repudiated this contract, and attempted to initiate a pre-emption claim by offering at the local land office a declaratory statement for the premises in controversy, together with the twenty-acre tract above described, which application was refused by the Land Officers, from whose decision defendant appealed to the Commissioner of the General Land Office, where, at the date of the trial below, the matter remained undisposed of. (Folios 11, 20, 21.) In January, 1877, he moved into and took possession of a house erected by Squires, on the land in controversy. The land in controversy, from 1860 to date of defendant's entry in January, 1877, had been, as before noticed, occupied and exclusively possessed by Fletcher and Bicknell and their grantors. It had been all enclosed, and at date of defendant's entry, the north eighty acres, on which was the said house, was enclosed on three sides. One of these fences separated the premises in controversy from the twenty acres originally entered upon by Mower. There was a bearing orchard of 1500 trees, fifteen years old, a dwelling house, corral, and out-houses, all of which had been placed on the lands by the said Squires, grantor of plaintiffs. (Folios 12, 19, 20, 21, 22.) In December. 1876, defendant tendered to the local officers final proof and payment, which was refused.

On these proceeding defendant below claimed title under the pre-emption law. He had no other right, title or interest in the premises. (Folio 13.) He relied, however, upon certain alleged defects in the title of plaintiffs under the patent from the State, all of which may be stated under three heads:

1. Alleged irregularity in various steps antecedent to the listing and patent. (Folios 22 to 34.)

2. That at date of selection the premises in controversy were within the claimed limits of a certain Mexican grant, known as the Sausal Redondo. (Folios 10, 11, 35, 36.)

3. That the land in lieu of which the premises in controversy were selected, was not lost to the State, but remained to it in place. (Folios 34, 35.)

In the trial court defendant had judgment, (folio 14); motion for new trial upon statement settled by the court, was denied, (folio 50); from said judgment and order plaintiffs appealed to the Supreme Court of the State, (folios 50 and 51,) and this latter court reversed said judgment and order, and remanded the cause, with directions to enter judgment, upon the findings, that the plaintiffs recover the premises described in the complaint, (folio 52.) Thereupon the defendant below brought the cause to this court by writ of error, (folio 57.)

BRIEF.

I.

We were entitled to judgment upon the title proved. The selection, listing and patent, conveyed the legal title of the United States to Squires, our grantor; and that title is conclusive, in ejectment, having been issued by the proper authorities of the United States acting within the scope of their jurisdiction. Unless absolutely void, for want of jurisdiction in the land department, to adjudge the State entitled and to list her the land, the title thus passed is conclusive in an action of this kind.

Smelting Co. *vs.* Kemp, 104 U, S., 279.
Steel *vs.* Smelting Co., 106 Id., 447.

II.

The validity of plaintiffs' title is established by the decisions of this court.

Quinby *vs.* Conlan, 104 U. S., 420.
Frasher *vs.* O'Conner, 115 U. S., 102.

III.

The assumption that the title of defendant in error to the tract in controversy is void because the S. E. quarter section 36, Tp. 4 S. Range 4 W. S. B. M., in lieu of which the indem-

nity selection was made, is "in place" and not lost to the State, is unsound as a proposition of law.

The Land Department as a special tribunal, erected by Congress for that purpose, by the act of March 3, 1853, (10 Stat., 244,) had jurisdiction to decide the question of *fact* whether the 36th section had been lost to the State, and, having decided that it had been lost, (folios 46, 47,) and having approved the tract in suit in lieu of it, and thereby passed the title, in manner and form as prescribed by law, such title is good, and vested an indefeasible interest in fee in the State.

Johnson *vs.* Towsley, 13 Wall., 72.

United States *vs.* Schurz, 102 U. S., 400.

The United States might, perhaps, prior to the confirmatory act of 1877, on the facts of this case, have instituted direct proceedings in equity to annul its grant.

Moore *vs.* Robbins, 96 U. S., 530.

Johnson *vs.* Towsley, 13 Wallace, 72.

But the plaintiff in error, whose settlement was made on a date long after the title passed out of the United States, has no prior equities, and cannot attack the title collaterally as is attempted in this action.

Dall *vs.* Meader, 16 Cal., 325.

Bush *vs.* Ware, 15 Peters, 93.

Moore *vs.* Robbins, 96 U. S., 530.

Sparks *vs.* Pierce, No. 563, present term.

Even if irregularities, or defective or illegal steps, are found in the proceedings antecedent to the listing, they can only be taken advantage of, if at all, by the United States, in a direct proceeding. Until this is done, the legal title of the United States is in her grantee, and cannot be questioned collaterally.

Frasher *vs.* O'Conner, 115 U. S., 102.

IV.

Whatever may have been the condition of the title to this tract originally, all defects therein were cured by the remedial act of Congress approved March 1st, 1877,

(19 Statutes, 267,) by which all previously certified or approved selections which were defective because the 16th or 36th Section in lieu of which they were made were not included within the final survey of Mexican grants, *or were otherwise defective or invalid*, were confirmed.

Opinions of the Secretary of the Interior in:
Jackson *vs.* California, 4 Copp's Landowner, 89.
Frasher *vs.* O'Conner, 115 U. S., 102.

The confirmation by Congress vested an indefeasible and irrevocable title.

Strother *vs.* Lucas, 12 Peters, 454.
Chouteau *vs.* Eckart, 2 How., 372.
Terrett *vs.* Taylor, 9 Cranch, 50.
Wilkinson *vs.* Leland, 2 Peters, 657.

And such confirmation had relation to the date of the selection of the land by the State, so as to cut off all intervening adverse claims. This rule is elementary.

Couise on Real Property, Vol. 5, p. 510.

The plaintiff in error acquired no vested right to this land, because it was not open to pre-emption at the date of his settlement, and Congress had a lawful right to confirm the title of the State.

Frisbie *vs.* Whitney, 9 Wall., 187.
Hutchings *vs.* Low, 15 Id., 77.

V.

If the selection was not confirmed by said section above cited, then the preference to purchase the land from the United States at the minimum price per acre, was clearly granted by the 1st proviso to 2d section, and out of abundant caution, defendants in error have availed themselves of that right as shown by Exhibit "A," hereunto attached, of which fact this court will take judicial notice.

Brown *vs.* Piper, 91 U. S., 37.

VI.

Admitting, for the purposes of the argument, that defendants

in error had no valid title to the land, they admittedly had the prior peaceable possession thereof, together with the extensive and valuable improvements thereon, and the land was not therefore subject to the pre-emption claim of the plaintiff in error.

Atherton *vs.* Fowler. 96 U. S., 513.

Hosmer *vs.* Wallace, 97 U. S. 575.

And defendants, by virtue of such prior possession, were entitled to maintain ejectment against the plaintiff, who was a mere trespasser upon the land.

Grover *vs.* Hawley, 5 Cal., 485.

Bradshaw *vs.* Treat, 6 id., 172.

Conger *vs.* Weaver, 6 id., 548.

Bird *vs.* Dennison, 7 id., 297.

Hestres *vs.* Brannon, 21 id., 423.

Hawxhurst *vs.* Lander, 28 ie., 331.

Polack *vs.* McGrath, 32 id., 15.

VII.

Although there may have been inadvertence and mistake there is not a particle of evidence tending to show, and no finding that there was any fraud in the selection or listing of the lands by the United States to the State. The record discloses no intimation of fraud outside of the defendant's answer. In case No. 102, the trial court expressly found that the listing was made "inadvertently and by mistake," (folio 24.) The brief of counsel for plaintiff in error, in this connection, is simple declamation, entirely outside the record. And no matter what was the character of the original transaction, it could by no possibility have been a fraud upon Mower.

United States *vs.* Arredondo, 6 Pet., 716.

Frasher *vs.* O'Conner, 115 U. S., 102.

VIII.

Counsel for plaintiff in error, if we correctly understand their brief, pages 21 to 23, seriously argue that the Squires title, for a portion of the premises at least, was not in defendants in error, at the commencement of the suit or trial and they refer

to the testimony of the witness McCullom, (folio 22.) The fact that the said title had passed by mesne conveyances from Squires to defendants in error, and at date of trial was still in them, is expressly conceded by stipulation, (folio 18,) and is specifically found by the court, (folio 10.)

M. D. BRAINARD,
JAS. K. REDINGTON,
Counsel for Defendants in Error.

EXHIBIT "A."

RECEIVER'S OFFICE AT LOS ANGELES, CAL.,
February 10, 1882.

Received from Nathan Fletcher, of Los Angeles County, California, the sum of Two Hundred Dollars, being in full for the N ½ of S. W. ¼ and S. ½ of N. W. ¼ quarter of Section No. 32, in Township No. Two (2) South, of Range No. Thirteen (13) West, S. B. M., containing one hundred and sixty acres, at $1.25 per acre. Act March 1st, 1877.

$200.00.

J. W. HAVERSTICK,
Receiver.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 10, 1885.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of Los Angeles, Cal., cash receipt, No. 901, in the name of Nathan Fletcher, is a true and literal exemplification of the original receipt issued to said Fletcher on February 10th, 1882, in payment for the lands therein described, now on file in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

W. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

[Original filed with Clerk U. S. Supreme Court.]

116-360

Office Supreme Court U. S.
FILED.
DEC 16 1885
JAMES H. McKENNEY
CLERK

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER, Defendant in Error. } No. 102.

In Error to the Supreme Court of California.

BRIEF FOR DEFENDANT IN ERROR.

M. D. BRAINARD,
JAMES K. REDINGTON,
Counsel for Defendant in Error.

WASHINGTON, D. C.:
PRINTED BY J. S. TOMLINSON,
No. 632 F Street, N. W.,
1885.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

B. W. MOWER, Plaintiff in Error,
vs.
NATHAN FLETCHER, Defendant in Error. } No. 102.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

In December, 1875, the defendant in error agreed, in writing, to convey to plaintiff in error twenty acres of land, for a consideration of $1,000. The sum of $500 was paid in cash, and a promissory note given for the balance, payable eighteen months after date, and plaintiff in error entered into possession. After maturity of the note, the same remaining unpaid, defendant in error tendered a deed, according to agreement, and demanded payment of the note, which was refused. Thereupon he brought suit upon the same.

The plaintiff in error, defendant below, admits all of these facts, but defends upon the ground that defendant in error, plaintiff below, had and has no legal title to the said land, and that there has been an entire failure of consideration.

The plaintiff below claimed title to the premises under a

patent from the State of California, dated March 31, 1873, to E. W. Squires, which patent was founded upon an application by Squires to the State to purchase the lands as school indemnity, a location by the State agent, and a listing of the lands to the State by the Commissioner of the General Land Office and Secretary of the Interior. (Folios 21 to 24; 60, 61.) He had also had, from 1860 to 1875, the date of the contract, by himself, or through his grantors, exclusive and uninterrupted occupation and possession of the premises. (Folios 61, 62.)

To establish failure of title, defendant below introduced documents and testimony tending to show, and, as he claimed, showing certain irregularities or illegalities in the various steps or proceedings antecedent to the listing and patenting, all of which may be classified under three heads, viz:

1. Alleged irregularities in the steps taken by the locating officer, in the proceedings terminating in the selection.

2. That at date of selection the premises in controversy were claimed to be within the limits of a Mexican grant.

3. That the land, in lieu of which indemnity was taken, was not lost to the State.

The judgment in the trial cause was for defendant (folio 30) motion for new trial upon settled statement (folio 65) was denied, (folio 66,) which judgment and order were, upon appeal, reversed by the Supreme Court of the State, and the cause remanded with directions to enter judgment for plaintiff, (folio 68.) From this latter judgmeut the cause comes here upon writ of error.

BRIEF.

The sole question is, whether the defendant in error had, at the date of his tender of the conveyance to plaintiff in error, or has now, a title, the conveyance of which will satisfy the terms of the contract. If so, he was entitled to recover, and the judgment of the Supreme Court should be affirmed.

Exactly what that contract was, is difficult to determine from the vague and unsatisfactory findings, but it may be conceded

that it required the tender of a deed conveying a good title. He tendered just such a deed.

I.

We hold the legal title of the United States, which is conclusive, unless shown to be void for want of jurisdiction in the Land Department to issue it.

Smelting Co. *vs.* Kemp, 104 U. S., 279.
Steel *vs.* Smelting Co., 106 Id., 447.

II.

The validity of this title has been affirmed by this Court.

Quinby *vs.* Conlan, 104 U. S., 420.
Frasher *vs.* O'Conner, 115 Id., 102.

III.

As to the basis of the lieu selection, the Land Department, as a court of limited and exclusive jurisdiction, having determined, as matter of fact, that the tract in question had been lost to the State, such determination, followed by patent or its equivalent, is conclusive, and not open to review by any other tribunal.

Johnson *vs.* Towsley, 13 Wall., 72.
United States *vs.* Schurz, 102 U. S., 400.
Moore *vs.* Robbins, 96 U. S., 530.

And although it is possible that the United States might, prior to the confirmatory act of 1877, have brought suit to set aside its conveyance, yet that fact cannot be set up by plaintiff in error, to avoid his obligation under the contract.

IV.

All defects in the legal title, if any existed, are cured by the confirmatory act of March 1, 1877. (19 Stat., 267.)

Whatever may have been the condition of the title to this tract originally, all defects therein were cured by the 2d section of this remedial act, by which all previously certified and approved selections which were defective because the 16th or

36th selection, in lieu of which they were made, were not included within the final survey of Mexican grants, *or were otherwise defective or invalid,* were confirmed.

Jackson *vs.* California, 4 Copps, L. O., p. 89.

Frasher *vs.* O'Conner, 115 U. S., 102.

This confirmatory title was in defendant in error at the date when he tendered the deed of bargain and sale. (Folios 4, 7.)

This confirmation vested an absolutely perfect and indefeasible title.

Strother *vs.* Lucas, 12 Peters, 454.

Choteau *vs.* Eckart, 2 How., 372.

Territt *vs.* Taylor, 9 Ch., 50.

Wilkinson *vs.* Leland, 2 Pet., 657.

And related to date of selection.

Couise on Real Property, Vol. 5, p. 510.

V.

If the defendant in error has good title to the land, which he can convey at the rendition of the final judgment in this case, there is no failure of consideration, on the note in suit.

Clute *vs.* Robinson, 2 John., 613.

VI.

From abundant caution, defendant in error has also a second time acquired the title of the United States, under the 2d section of the said act of 1877. See "Exhibit A" to brief in No. 103, of which official action of the Land Department this court will take judicial notice.

Brown *vs.* Piper, 91 U. S., 37.

VII.

The exclusive and uninterrupted possession of the defendant in error, beyond the period prescribed by the statute of limitation, five years, (Code Civil Pro. Sec. 318,) gave him a good title against all the world except the United States. That alone, the United States consenting, would have been a sufficient title to have tendered the plaintiff in error.

VIII.

While there may be evidence or finding of inadvertence or mistake, there is not a particle of evidence tending to prove, and no finding that there was any fraud, or suggestion thereof, in the selection and listing of the lands to the State of California by the Land Department. Fraud will not be presumed. It will not be imputed to a sovereign State, in the absence of all evidence, and no matter what was the character of the original transaction, there could not, possibly, have been any fraud upon Mower.

U. S. *vs.* Arredondo, 6 Pet., 716.
Frasher *vs.* O'Conner. 115 U. S., 102.

VIII½.

The defendant below set up an equitable defence in his answer and cross-complaint.

In equity he is estopped from setting up an outstanding title to avoid the payment of the purchase money for the land.

Bigelow on Estoppel, (3d Ed.,) p. 428, and cases there cited.
Bush *vs.* Marshall, 6 How., 291.
Galloway *vs.* Findlay, 12 Pet., 295.

It is entirely clear that this is not so much a question of the validity of our title, as the *price and extent* of his possessions, that troubles plaintiff in error. The two records transparently show a dishonest attempt by Mower not only to avoid his contract as to the twenty-acre tract, but also, deliberately and wilfully to appropriate one hundred and forty acres more of our property, deeded to us by the United States, and improved by us for years. By complying with his contract he gets twenty acres for $1,000. By successful repudiation of it, and maintaining his pre-emption claim, he would get 160 acres for $200.

M. D. BRAINARD,
JAMES K. REDINGTON, } *Counsel for Defendant in Error.*

116 386

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 882.

JOHN H. STEBBINS, EDWARD G. JUDSON, WILLIE AMOS TENNEY, SUTHERLAND TENNEY, WILLIAM D. JUDSON AND AMOS TENNEY, DOING BUSINESS AS JOSEPH E. YOUNG & COMPANY, APPELLANTS,

vs.

THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS, THE CHICAGO, DANVILLE, AND VINCENNES RAILROAD COMPANY, AND A. S. DUNHAM, RECEIVER OF SAID RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 13, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885

No. 882.

JOHN H. TEBBINS, EDWARD G. JUDSON, WILLIE AMOS TENNEY, SUTHERLAND TENNEY, WILLIAM D. JUDSON AND AMOS TENNEY, DOING BUSINESS AS JOSEPH E. YOUNG & COMPANY, APPELLANTS,

vs.

THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS, THE CHICAGO, DANVILLE, AND VINCENNES RAILROAD COMPANY, AND A. S. DUNHAM, RECEIVER OF SAID RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	3	2
Subpœna	35	16
Marshal's return	36	16
Appearance	37	17
Demurrer	39	18
Stipulation as to hearing on demurrer	53	23
Decree	54	24
Appeal allowed	55	24
Order extending time to file bond	55	24
Bond	56	24
Clerk's certificate	58	62

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Monday, the fourth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year.

WM. H. BRADLEY, *Clerk.*

In Chancery.

JOHN H. STEBBINS, EDWARD G. JUDSON, WILLIE AMOS TENNEY, Sutherland Tenney, and William D. Judson and Amos Tenney, doing Business under the Name and Style of Joseph E. Young & Company,

vs.

THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS, THE CHICAGO, Danville, and Vincennes Railroad Company, & A. S. Dunham, Receiver of The Chicago, Danville, and Vincennes Railroad Company.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-fifth day of June, 1884, came the complainants, by their solicitors, and filed in the
2 office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bond for costs and bill of complaint in said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

Bond.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Circuit Court, July Term, A. D. 1884. In Chancery.

JOHN H. STEBBINS *et al. vs.* THE TOWN OF ST. ANNE *et al.*

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the compl'ts of any costs ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 25th day of June, A. D. 1884.

C. S. MARONI.

Endorsed: Filed June 25, A. D. 1884. Wm. H. Bradley, clerk.

3 Circuit Court of the United States. July Term, A. D. 1884.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To the judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

John H. Stebbins, of the county of Franklin, in the State of Massachusetts, and a citizen of said State of Massachusetts, Edward G. Judson, Willie Amos Tenney and Sutherland Tenney of the city of New York, and citizens of the State of New York, and William D. Judson and Amos Tenney of the city of New York and citizens of the State of New York, and lately copartners with one Joseph E. Young and doing business under the firm name and style of Joseph E. Young and Company, bring this their bill of complaint against the town of St. Anne, a body corporate and politic located in the county of Kankakee in said northern district of Illinois, and a citizen of said State of Illinois; The Chicago, Danville and Vincennes Railroad Company, a citizen of the State of Illinois, and organized under the laws of that State; and A. S. Dunham of Chicago, and a citizen of the State of Illinois, receiver of said The Chicago, Danville and Vincennes Railroad Company, defendants.

4 And thereupon your orators complain and say that from, to wit, the year A. D. 1852, said The Town of St. Anne has been a duly organized body acting under the laws of the State of Illinois, commonly known as the township organization act, and is now a duly organized town under said act.

Your orators further show that said The Chicago, Danville and Vincennes Railroad Company was duly incorporated by the Legislature of the State of Illinois on the 16th day of February, A. D. 1865, with full power to construct a railroad from a point in Lawrence county, Illinois, opposite Vincennes, in the State of Indiana, to the city of Chicago, in said State of Illinois, by way of Danville, Illinois.

That on March 7th, 1867, the Legislature of Illinois passed an act authorizing cities, towns, and townships within twenty miles west of the boundary line between said States of Illinois and Indiana along the line of said proposed railroad in Illinois, to appropriate such sums of money as they might respectively elect, to aid in the construction of said railroad, which said act is printed in Vol. I, at page 842 of the Private Laws of the State of Illinois of 1867, entitled "An act to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad," approved and in force March 7, 1867, and made a part of this bill. That said

5 The Town of St. Anne lies wholly within the territory contemplated by said act.

That on March 24, 1869, the Legislature of the State of Illinois passed another act authorizing the towns, townships, cities, or counties along the line of said railroad to contribute such sums as they might respectively elect towards aiding in the construction of said

railroad, providing a majority of the legal voters, in cases of towns, of any such town voting at an election called for that purpose, so voted; and that the authorities of any such town so voting might borrow money or issue its bonds drawing interest at a rate not to exceed ten per cent., and sell the same as to said authorities might seem best for the interests of such town, and also levy taxes upon the taxable property of said town from year to year to pay the yearly accruing interest on said bonds, as also the principal thereof at maturity, and that such aid should become due and payable as soon as said railroad was constructed into or through such town.

That such act is entitled "An act to enable towns, townships, cities, or counties along the line of the Chicago, Danville and Vincennes Railroad to contribute towards the construction of said railroad," found in Vol. 3 at page 356 of the Private Laws of the State of Illinois, of the year A. D. 1869, which said act is made a part of this bill, and reference is had thereto.

6 Your orators further aver that on, to wit, February 2, 1869, said railroad company entered into a contract with said Joseph E. Young, William D. Judson, and Amos Tenney, copartners as Joseph E. Young and Company, as aforesaid, to construct and equip said railroad from Danville, Illinois, northward and through said The Town of St. Anne, one hundred and ten miles into the county of Cook and State of Illinois, being the county in which said city of Chicago is located; in consideration of which service on the part of said Joseph E. Young and Company, said The Chicago, Danville and Vincennes Railroad Company covenanted and agreed to, and in fact did, transfer, set over, and assign to said Joseph E. Young and Company, as their own property, free and clear of all liens, claims, or demands, all donations, bonds or aids, which had been or which might be contributed by the municipalities along the line of said railroad and within the territory specified by said several acts of the Legislature of Illinois, and that such bonds, aids, or contributions should be paid over to said Joseph E. Young and Company as rapidly as the same might be issued, and said railroad company agreed to execute all proper and needful assignments to fully carry out said contract between said railroad and said Joseph E. Young and Company for the building of said railroad.

7 Your orators aver that said Joseph E. Young and Company at once entered upon the execution of said contract, and prosecuted the same with such speed that said railroad was fully constructed and equipped by them on and before December 1, 1871.

Your orators further aver that on, to wit, May 24, 1869, a petition signed by the supervisor, town clerk, one justice of the peace, and twelve freeholders of said, The Town of St. Anne, and presented to the clerk of said town, requesting him to call an election in said town to vote for or against contributing the sum of thirty thousand dollars towards the construction of said railroad, and procuring the right of way through said town, which said petition is in words and figures as follows, to wit:

"The undersigned town officers and twelve freeholders of the town of St. Anne, in the county of Kankakee and State of Illinois,

do state a special election is necessary to the interest of said town for the purpose of voting for or against raising a subscription by tax upon said town of the amount of thirty thousand dollars, and the right of way through said town to aid in the construction of the Chicago, Danville and Vincennes railroad, with the express condition that said railroad shall be located within one hundred and sixty-four rods from Main street, in said village of St. Anne, and a station to be built opposite Martin street, in said village of St. Anne, and that said sum of thirty thousand dollars shall be
8 paid in the following manner, to wit, in bonds bearing interest not exceeding ten per cent. per annum, payable in eight installments as follows: One thousand dollars in the year 1871, two thousand dollars in 1872, three thousand dollars in 1873, four thousand dollars in 1874, and five thousand dollars per year from 1875 until said thirty thousand will be entirely paid; and provided, also, that all preceding elections concerning said road within said town shall be null and void.

"We would therefore request that immediate notice be given thereof, and that such meeting be held on the 5th day of June, A. D. 1869.

"LEON MAILLEAUX, *Supervisor.*
"ACHILLES CHINIQUY, *J. P.*
"MOSES CHARTIER, *Town Clerk.*
"G. DEMARE.
"C. CHINIQUY.
"AUGUSTINE FANCHER.
"MEYLAISE DENERTEAW.
"LOUIS MERCEIR.
"LEYRANTE CHOYER.
"LEANDER CHARTIER.
"CYRILLE MIGESON.
"ANDREW CHANQUEN.
"JEROME THYFAULT.
"NICHOLIS MANY.
"ETIENNE BOUDREAW.
"LANDRY BROUILIETTE.
"S. C. VANICE, *M. D.*
"SIMON ALLARD.

"Endorsed on back: Filed this 24th day of May, A. D. 1869. Moses Chartier, town clerk."

9 That in pursuance of said petition the clerk of said town did on May 25, 1869, post notices in five of the most public places in said town, setting forth the substance of said petition and calling an election of the legal voters of said town to be held on June 5, 1869, as will more fully and at large appear from said notice, which is in words and figures as follows, to wit:

"*Special Town Election.*

"Whereas the supervisor, town clerk, and justice of the peace, to-

gether with twelve freeholders of the Town of St. Anne, have in writing filed in my office a statement that a special town election is necessary to the interest of said town, setting forth the objects of the meeting, the inhabitants, legal voters, of the said Town of St. Anne are, therefore, hereby notified that a special town election will be held at the institute room in the village of St. Anne on the 5th day of June, A. D. 1869, at nine o'clock in the forenoon, for the purpose following, to wit:

"To vote for or against raising a subscription by tax upon said town of the amount of thirty thousand dollars, and the right of way through said town to aid in the construction of the Chicago, Danville and Vincennes railroad, with the express condition that said railroad shall be located within one hundred and sixty-four rods from Main street, in the village of St. Anne, and a station be
10 built opposite Martin street in said village of St. Anne, and that said sum of thirty thousand dollars shall be paid in the following manner, to wit: In bonds bearing interest not to exceed ten per cent. per annum, payable in eight installments as follows: One thousand dollars in the year 1871, two thousand dollars in 1872, three thousand dollars in 1873, four thousand dollars in 1874, and five thousand dollars per year from 1875 until said thirty thousand will be entirely paid, and providing also that all preceding elections concerning said railroad within said town shall be null and void, being the object contained in said statement filed in my office.

"Given under my hand, at St. Anne, this 25th day of May, A. D. 1869.

"MOSES CHARTIER,
"*Town Clerk.*"

That in pursuance of said petition and notice there was an election held in said town in conformity with said several acts of the Legislature, on June 5, 1869, at which election there were cast by the legal voters of said The Town of St. Anne one hundred and twelve votes in favor of donating the sum of thirty thousand dollars, in bond of said town, in aid of said railroad, and seventy-five votes against donating said aid, the result of said election and the
11 terms and conditions of said vote being more fully set forth in the certificate of the town clerk of said The Town of St. Anne, and spread upon the records of said town, which certificate is in words and figures as follows, to wit:

"At a special town election held in the Town of St. Anne, in the county of Kankakee and State of Illinois, on the 5th day of June, A. D. 1869, for the purpose of voting for or against raising a subscription, by tax upon said town, of the amount of thirty thousand dollars, and the right of way through said town, to aid in the construction of the Chicago, Danville and Vincennes railroad, with the express condition that said railroad shall be located within one hundred and sixty-four rods from Main street in said village of St. Anne, and a station be built opposite Martin street in said village of St. Anne, and that said sum of thirty thousand dollars shall be paid in the following manner, to wit: In bonds bearing interest not exceed-

ing ten per cent. per annum, payable in eight installments, as follows: One thousand dollars in the year 1871, two thousand dollars in 1872, three thousand dollars in 1873, four thousand dollars in 1874, and five thousand dollars per year from 1875 until said thirty thousand will be entirely paid.

"And providing, also, that all preceding elections concerning said road within said town shall be null and void.

12 "One hundred and twelve persons voted for said tax according to said provision and seventy-five voted against said tax.

"Witness my hand and seal this 5th day of June, A. D. 1869.

"MOSES CHARTIER,

"*Town Clerk.*"

Your orators further aver that said Joseph E. Young and Company in pursuance of said contract with said railroad company for the construction of said railroad from Danville aforesaid to Chicago, entered upon the construction thereof and prosecuted the same with such dispatch, that by December 1, 1870, said railroad was fully completed through said The Town of St. Anne in conformity with said contract and with the terms and conditions of said vote in said town held on June 5, 1869 aforesaid, and on said December 1, 1870, the line of said railroad was fully constructed on the route and upon the conditions expressed in and by said vote and said donation then and there became due and payable, and said bonds subject to delivery by said town to said railroad or to said Joseph E. Young and Company, under their contract with said railroad company.

That on, to wit, December 19, 1869, the authorities of said town audited the claim of said railroad company and directed the

13 supervisor of said town to issue the bonds of said town, as provided by said vote, in the sum of thirty thousand dollars, which said supervisor then and there proceeded to do, and on December 24, 1870, executed thirty bonds, of the denomination of one thousand dollars each, bearing interest at the rate of ten per centum per annum, payable annually, as evidenced by coupons attached to said bonds and each of them, said bonds being payable as follows, to wit:

$1,000 payable July 1, 1871,
$2,000 payable July 1, 1872,
$3,000 payable July 1, 1873,
$4,000 payable July 1, 1874,
$5,000 payable July 1, 1875,
$5,000 payable July 1, 1876,
$5,000 payable July 1, 1877, and
$5,000 payable July 1, 1878.

That said bonds and each of them were executed by Leon Mailleaux, supervisor of said town, by the name and style of "The Township of St. Anne, but as the obligation of the Town of St. Anne, the proper corporate name of said town and defendant herein, which said bonds and each and every of them were alike and *fac simile* of each other, except as to the numbers thereof

and dates of payment, said bonds being numbered from 1 to 30, inclusive, and, except as to said numbers and dates of payment, are similar to said bond No. 4, which is in words and figures as
14 follows, to wit:

"UNITED STATES OF AMERICA, *State of Illinois*:

"No. 4. St. Anne Township Railroad Bond. $1,000.

"Know all men by these presents that the Township of St. Anne, in the county of Kankakee and State of Illinois, acknowledges itself to owe and be indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum of money the Township of St. Anne promises to pay to the bearer, —— ——, at the St. Nicholas Bank, in the city of New York, on the 1st day of July, in the year one thousand eight hundred and seventy-three, with interest thereon at the rate of ten per cent. per annum, which interest shall be payable yearly on the first day of July in each year at the St. Nicholas Bank, in the city of New York, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum.

"This bond is issued under and by virtue of the laws of the State of Illinois, made to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes railroad, and the faith of said Township of St. Anne is hereby pledged for the payment of said principal sum and interest as aforesaid.

15 "In witness whereof the supervisor of said township of St. Anne has subscribed this bond, this 24th day of December, one thousand eight hundred and seventy.

"LEON MAILLEAUX,
"*Supervisor.*"

Coupon as follows:

"St. Anne Township Railroad Bond.

"$100.00. Interest Warrant. No. 4.

"On the 1st day of July, 1871, the Township of St. Anne, Kankakee county, State of Illinois, will pay to the bearer, —— ——, one hundred dollars at the St. Nicholas Bank in the city of New York, being one year's interest on bond numbered as above.

"L. MAILLEAUX,
"*Supervisor.*"

There are other coupons, showing or being for each year's interest as it comes due till said bond is due, attached to each of said bonds, issued in conformity with the board of audit's order and as shown by the vote of the people of said town.

And your orators aver that on, to wit, December 27, 1870, said Leon Mailleaux, supervisor as aforesaid, acting under the directions of said town authorities, took said bonds to said city of Chicago and delivered the same, so executed as aforesaid, to said Joseph

16 E. Young and Company, as the contractors and builders of said railroad, and entitled to the possession and ownership of said bonds, under their contract with said railroad company, as herein set forth.

That after the delivery of said bonds, and each and every of them, by the said supervisor to said Joseph E. Young and Company, to wit, on December 27, 1870, said Joseph E. Young and Company, desiring to have said bonds registered in the office of the auditor of public accounts of the State of Illinois, as provided by an act of the Legislature of said State of Illinois, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869, redelivered said bonds to said supervisor, and engaged him to carry said bonds to Springfield, Illinois, where said auditor's office was located, execute the proper affidavit entitling said bonds to be registered under said act of April 16, 1869, have said bonds properly registered, and then return the same to them, the said Joseph E. Young and Company, which said trust and service said supervisor then and there agreed and undertook to perform; that after said bonds were redelivered to said supervisor as aforesaid he took the same and left for Springfield, for the purpose aforesaid, stopping on his way at his home in said The Town of St. Anne, and while there and in possession of said bonds, as the property of said Joseph E.

17 Young and Company, one Francis Coyer and others, the citizens of said town, caused a bill to be filed in the circuit court of the county of Kankakee, in which said town is situated, against said Mallieaux and all the other officers of said town who formed the board of audit of said town, setting up certain facts about said bonds, and obtained an injunction against said Mailleaux and others from again delivering said bonds, which bill was filed and the injunction issued in Kankakee county, Illinois, and said injunction was served on the 5th day of January, 1871, which suit remained in court till the 4th day of April, 1876, when said bill was by the circuit court of Kankakee county, Illinois, dismissed and said injunction dissolved after said cause had gone to the supreme court of Illinois, and the issue of said bonds having been declared valid, the opinion of said supreme court being reported as case Chicago, Danville and Vincennes Railroad Company *vs.* Francis Coyer *et al.*, 79 Ills., 373.

That while said suit was pending in said Kankakee circuit court said bonds, so executed as aforesaid and signed by said supervisor, were by order of said circuit court placed in the hands of the clerk of said court for safe keeping, and remained there until the 7th day of April, 1876, when Joseph Guertin, who was then the supervisor of said town, by virtue of a writ of replevin which he had

18 caused to be issued by one Otis Durfee, a justice of the peace of Kankakee county, Illinois, replevied said bonds from George P. Letourneau, who was clerk of said circuit court, which writ was made returnable on April 15, 1876, and more fully shown by the record of said writ in replevin, as shown by a transcript of the docket of said justice of the peace, which is in words and figures as follows, to wit:

"*Replevin.*

"STATE OF ILLINOIS, }
"*Kankakee County,* } *ss:*

"In Justice's Court.

"JOSEPH GUERTIN, Supervisor of The Town of St. Anne,
vs.
GEORGE R. LETOURNEAU.

"Before Owen Durfee, J. P.

"A. D. 1876, APRIL 7TH.

"Affidavit of Joseph Guertin, supervisor, having been filed in the above-entitled cause, a writ of replevin is issued returnable the 15th day of April, at ten o'clock a. m., and delivered to Constable Jos. E. Langois to serve. Constable Langois returned the writ, together with the bond signed by James Burnes as surety; the writ has the following endorsement upon it: 'I have executed the within writ by taking the within-named property and returned it to the within-named plaintiff,' Joseph
19 Guertin, supervisor of the Town of St. Anne, also by reading the within writ to the within-named defendant, George R. Letourneau, this 7th day of April, A. D. 1876. Fees, $1.10. April 15, 1871, a subpœna is issued at the request of the plaintiff, returnable forthwith, and delivered to Constable Willis, who returned it, within-named witness not found. Fees, $5.00. At ten o'clock the case is called, parties in court, C. R. Starr appearing for plaintiff, and defendant appearing in his own proper person. Jos. Guertin, Thomas Bonfield, and Harrison Loring were sworn and testified in behalf of the plaintiff, the defendant producing no evidence; the plaintiff also producing certified copies of the record of the Kankakee county circuit court, also of the supreme court of the State of Illinois.

"After hearing the evidence it is considered and adjudged by the court that the right of possession of the property mentioned in the affidavit is in the plaintiff, and that the plaintiff have and recover for his damages a judgment against the defendant, G. R. Letourneau, for $1.95, costs of suit.

"OTIS DURFEE, *J. P.*"

And your orators charge that the property mentioned in the proceedings before said justice of the peace and in said writ of replevin were the bonds of said The Town of St. Anne, executed and
20 delivered as aforesaid to said Joseph E. Young and Company.

And your orators charge that after said bonds were replevied as aforesaid and before the hearing of said cause, to wit, on April 8th, 1876, the authorities of said town fraudulently and without any warrant of law burned and wholly destroyed all of said bonds, except said bond number 4, which had not been seized under said writ of replevin, which said destruction of said bonds was without the knowledge or consent of said Joseph E. Young and

Company or said railroad company, or either of them, and which said destruction, so unlawfully made, was duly recorded in the records of said The Town of St. Anne in words and figures as follows, to wit:

"At the request of Joseph Guertin, supervisor of the Town of St. Anne, the board of town auditors met at the town hall on the 8th day of April, A. D. 1876, for the purpose of taking into consideration and taking action in a certain matter relative to a certain amount of town bonds of said town, when said supervisor represented — the said board that he had come in possession of the above-stated bonds, and considering himself unsafe in the holding and keeping the same demands of said board to take action as to what is to be done with them. On motion, it was resolved that inasmuch as these bonds are worthless and of no account, and that the interest of the town requires the immediate destruction
21 of them, therefore said board proceeded and ordered that the town clerk do destroy said bonds immediately; whereupon the clerk proceeded and destroyed the same by burning in the presence of the town board and audience of tax-payers of said town.

"JOSEPH GURTIN, *Sup.*
"LEON MALLEAUX, *J. P.*
"L. PARIDES, *T. Clk.*"

Your orators show that the said town fraudulently replevied said bonds that had been legally issued by the authorities of said town, and delivered as aforesaid, before a justice who had no jurisdiction of said matter, as the value far exceeded his jurisdiction, and then burned the same at once, long before the suit was set for trial before said justice as aforesaid, and for the sole purpose of destroying the same.

Your orators show that on the 7th day of September, 1877, said Joseph E. Young and Company and said Chicago, Danville and Vincennes railroad filed in the circuit court of Kankakee county and State of Illinois a bill against said Town of St. Anne, setting forth certain facts and asking that said town issue their bonds and deliver them to said Young and Company under said contract with the railroad company, by virtue of said petition and notices and vote aforesaid.

22 That at the May term, 1880, of said circuit court said bill was on demurrer thereto dismissed by said court without prejudice, and appeal taken therefrom to the appellate court of the second district of the State of Illinois, where it was affirmed, and an appeal was taken from said appellate court to supreme court of the State of Illinois, where it was again affirmed on November 10, 1881. That on August 1, 1883, said Joseph E. Young and Company filed their bill in said circuit court for northern district of Illinois against said The Town of St. Anne, seeking to recover said donation, which was on June 2, 1884, dismissed without prejudice to the rights of said Stebbins, Edward G. Judson, and Willie Amos and Sutherland Tenney, or any other person or persons entitled to said donation.

That said bonds have been in litigation almost continuously from December 19, 1870, and said railroad company and these complainants have been at all times claiming said bonds; and in said suit of Coyer and others against said Leon Mailleaux and others, in said Kankakee circuit court, all of the facts touching the legality of said election and conditions were fully tried, and on appeal to the supreme court of the State of Illinois said court decided said company had in all things complied and was entitled to said bonds, and that said town was liable therefor, which decision is found in the 79 Illinois Reports, on page 374, and on the filing of the order re-
23 versing the decree of said circuit court, said bill was by said Coyer and others, April 4, 1876, dismissed as heretofore shown, and then the fraudulent replevin proceedings and all the others as heretofore shown followed.

It is further shown that said bill by Young and Company and said railroad company against said town in the Kankakee circuit court, failed to show that said railroad company was insolvent, or that Young and Company had obtained a judgment againt said railroad company, and execution had issued thereon and retured *nulla bona*, or that the bonds had ever been issued and delivered as herein set forth, and said court on that account held there was a complete remedy at law and dismissed the bill as aforesaid, and the counsel trying said demurrer failed to obtain leave to amend the bill and set forth said facts before said circuit court adjourned.

Your orators show that said Chicago, Danville and Vincennes Railroad Company had a receiver appointed by this court on May 20, 1875, at the instance of one of its creditors, and said company has been in the hands of a receiver from that time until the present, the acting receiver at this time being A. S. Dunham, one of the defendants herein. That Adna Anderson, a former receiver of said road, in his report in 1875 to this court, shows there was due, according to the books of said railroad company, to Judson and
24 Tenney $588,536.10, and that this account represented the accounts of J. E. Young and Company, the contractors for building the Illinois Division of said road.

Your orators further show that said John H. Stebbins, Edward G. Judson, Willie Amos Tenney, and Sutherland Tenney are the real equitable owners of all and singular the interests, claim, and demand of said Joseph E. Young and Company, or said railroad company, or its receiver, against said The Town of St. Anne, and in and to the bonds herein set forth, and said John H. Stebbins is equitably entitled to one-third of the claim of said Joseph E. Young and Company against said railroad company, or the judgment against said railroad company, as herein set forth.

That John H. Stebbins obtains his interest as follows, to wit: Joseph E. Young, one of the members of said firm of Joseph E. Young and Company, in the year 1875, being in insolvent circumstances, the said John H. Stebbins, being one of his creditors, caused a bill to be filed in the circuit court of Cook county and State of Illinois on January 14, 1875, against said Young and one Samuel J. Walker, and said court, on January 16, 1875, appointed one Luther

H. Pierce receiver of said estate of Joseph E. Young, and on the 16th day of January, 1875, said Young, by order of said court, deeded to said Pierce all his property of every name and nature for benefit of his creditors. That said Pierce applied to said
25 court for an order of sale of the property of said Young, and on September 27, 1876, said court granted an order of sale of said property, among which were the claims against said railroad company—one for $600,000 and the other for $300,000.

That in pursuance of said order said receiver advertised said claims, and on the first of November, 1876, they were by said receiver sold, and at said time they were bought for said Stebbins by David L. Hough, his attorney-in-fact, and at said time a certificate was issued to him therefor.

That said receiver made a report of said sale to said court and asked that same be approved, and on November 25, 1876, said court entered an order that said sale should stand confirmed, unless exceptions be taken thereto within ten days; and that there were no exceptions filed thereto.

Said report shows that said Young owned one-third of said claims against the Chicago, Danville and Vincennes Railroad Company.

It is further shown that said Young was, on the 3rd day of April, 1876, in the district court of the United States for the northern district of Illinois, adjudged a bankrupt, and on the 3rd day of May, 1876, said Luther H. Pierce was appointed assignee of said Young's estate, and on the 30th day of March, 1877, said Young was discharged.

26 Therefore, all the right and claim said Young has to any of said claim against said railroad company or said Town of St. Anne has become vested in said John H. Stebbins.

And your orators further show that said Edward G. Judson is the equitable owner of all the interest of the said William D. Judson, of said firm of Joseph E. Young and Company, in and to all claim and demand of said Joseph E. Young and Company against said The Town of St. Anne, and said Edward G. Judson claims said interest against said town by virtue of a written assignment from said William D. Judson, which is in words and figures as follows, to wit:

"This agreement, made and entered into this 8th day of February, 1876, between William D. Judson, of the city of New York, party of the first part, and Edward G. Judson, of said city, party of the first part, witnesseth as follows:

"Whereas the party of the first part is indebted to the said party of the second part in the sum of fourteen thousand dollars, and the interest thereon from the twenty-fourth day of February, A. D. 1874: Fow, for the purpose of securing the payment of the same, or as much thereof as may be realized by virtue of this instrument, and in consideration of one dollar in hand paid by the party of the second part to the party of the first part, the receipt of which is acknowledged, the said party of
27 the first part hereby sells, assigns, transfers, sets over, and conveys to the party of the second part, his successors and as-

signs, all interest which said party of the first part has in, of, and to certain claims and demands of the firm of J. E. Young and Company against the town of Beaver, county of Iroquois, State of Illinois, and the Town of St. Anne and the town of Sumner, in the county of Kankakee and State of Illinois, which said claims are now in litigation in the courts of Illinois. And this assignment is intended to and does include all the interest which the party of the first part has as a member of the firm of J. E. Young and Company, or otherwise, in any claim or demand against the towns aforesaid or either of them.

"Witness our hands and seals the day and year first aforesaid.

"WILLIAM D. JUDSON. [SEAL.]
"EDW'D G. JUDSON. [SEAL.]

"Signed, sealed, and delivered in presence of—
(Signed) "G. E. BORLAND."

And your orators aver that said Willie Amos Tenney and Sutherland Tenney obtained their interest in and to the share of said Amos Tenney in the firm assets of said Joseph E. Young and Company and the demand of that firm against said The Town of St. Anne by virtue of a written assignment, which is in words and figures as follows, to wit:

"This agreement, made the 9th day of March, 1876, be-
28 tween Amos Tenney, party of the first part, and Willie Amos Tenney and Sutherland Tenney, of the second part:

"Whereas the said party of the first part was by an order of the Hon. Gideon J. Tucker, then surrogate of the county of New York, on or about the 12th day of October, 1864, duly appointed sole executor of the last will and testament of M. Antoinette Tenney, deceased, and by certain other orders was, on the 9th day of May, 1867, duly appointed general guardian of the persons and the estates of the parties hereto, of the second part; and

"Whereas the said party of the first part, as such guardian, received large amounts of property, both real and personal, in trust for the parties of the second part; and

"Whereas the said party of the first part has never accounted to the parties of the second part for any of the said personal property, or for any of the rents and profits of said real property, and there is now justly due and owing in the premises from the party of the first part to the parties of the second part, which sum would be found on accounting to amount, with interest, to the sum of twenty thousand dollars and upwards:

"Now, this indenture witnesseth: That the party of the first part, for the better securing the parties of the second part in the premises, and in further consideration of one dollar to him in hand
29 paid, hath given and assigned, transferred, and set over, and by these presents doth give, assign, transfer, and set over, unto the said parties of the second part, their successors and assigns, all his, the said party of the first part, interest of, in, and to certain claims of the firm of J. E. Young and Company against the town

of St. Anne, county of Kankakee, State of Illinois; the Town of Sumner, county of Kankakee, same State; and the Town of Beaver, county of Iroquois, same State, said claim being now in litigation in the courts of Illinois, and it is intended hereto to include all claims of any nature and kind soever of said J. E. Young and Company, or any member thereof, against said towns or any of them.

"Witness my hand and seal the day and year first above written.

"AMOS TENNEY. [SEAL.]

"In presence of—

"HUGO SLITZKER."

Therefore your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenney, and Sutherland Tenney, who are herein made parties to this cause, are now entitled to all the interest of said Joseph E. Young and Company to the claim against said town of St. Anne.

Your orators further charge that on, to wit, November 30, 1877, said firm of Joseph E. Young and Company recovered a
30 judgment in the circuit court of Iroquois county, in said northern district of Illinois, against said railroad company, for the sum of $588,556.10 and costs of suit, in an action at law for claims growing out of the construction of said railroad, but your orators aver that one-third of said judgment was equitably recovered for the use and benefit of said John H. Stebbins, who had succeeded to all the equitable rights of said Joseph E. Young in the firm of Joseph E. Young and Company, in and to the claims of said firm against said railroad company and against said town, and the other two-thirds belonged to William D. Judson and Amos Tenney.

That on, to wit, December 21, 1877, an execution issued on said judgment, and was placed in the hands of the sheriff of said Iroquois county to execute, who subsequently returned said execution in no part satisfied. That said judgment is still wholly unpaid.

Your orators charge that said railroad company is wholly insolvent, and has no property out of which to satisfy said judgment or any part thereof, or to pay said sum allowed by said receiver in favor of said William D. Judson and Amos Tenney in said proceeding in which said receiver was appointed.

And said Town of St. Anne, in Kankakee county, Illinois, is indebted as aforesaid to said railroad company, or to said Joseph E. Young and Company, under said contract, in the sum of
31 $30,000, and interest thereon at the rate of ten per cent. per annum from December 27, 1870, the time said bonds were delivered, said interest payable annually, as shown by said bonds and coupons that were issued and delivered to said Joseph E. Young and Company, as heretofore shown, on, to wit, December 27, 1870, and interest at the rate of six per cent. on said coupons and bonds after they matured, and now amounting to the sum of about $90,000.00; and your orators are remediless, except in a court of equity, where matters of this kind are cognizable.

Your orators show that no part of said judgment in the circuit court of Iroquois county, Illinois, or the claim of said Joseph E.

Young and Company against said railroad company for building and equipping said road, has been paid, said judgment being for what was due said contractors on said claim, and said road was by said contractors built and equipped in conformity with said contract, and was duly accepted and received from said contractors by said company and operated some time before it was placed in the hands of a receiver, at the instance of said creditors of said company, and was operated by said several receivers for several years.

Your orators show they are remediless at law to obtain any of said claim from said Town of St. Anne, and ask that your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenney, and Sutherland Tenney, may be decreed to be the legal and equitable
32 owners of said claim of said Joseph E. Young and Company against said The Town of St. Anne, and said Stebbins be decreed to own one-third of said judgment against said Chicago, Danville and Vincennes Railroad Company in the circuit court of Iroquois county, Illinois, and William Judson and Amos Tenney, Sr., the other two-thirds of said judgment, and that your orator Stebbins may be subrogated to the rights of said Joseph E. Young to all his claims and demands against said railroad company, and that said Stebbins and Edward Judson and Amos and Sutherland Tenney also be subrogated to all the rights, claims, and demands of said railroad company and said Joseph E. Young and Company against said The Town of St. Anne.

And your orators pray that inasmuch as the entire issue of said bonds would have been due before the commencement of this suit, and the rights of your orators and the obligations of said town having become fixed before this suit was begun, and inasmuch as said town, in equity, is now justly indebted upon its contract to pay said sum of $30,000, with interest thereon, as above set forth, a decree for the amount so due may be entered herein against said town, to be paid to your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenney, and Sutherland Tenney, as the equitable assignees of said Joseph E. Young and Company, and that said Chicago, Danville and Vincennes Railroad Company and A. S. Dun-
33 ham, the present receiver of said company, as well as the Town of St. Anne, be made parties defendant to this bill of complaint, and they and each of them full, true, direct, and perfect answer make to all and singular the allegations in this bill, without oath, their oaths, and each of them, being waived; and on a final hearing of this cause that said Town of St. Anne be decreed to pay to your orators, John H. Stebbins, Willie Amos Tenney, and Sutherland Tenney, as the assignees and successors of Joseph E. Young and Company, creditors of said railroad company, said sum of $30,000, and interest thereon at the rate of ten per cent. per annum, said interest payable annually, as shown by the bonds and coupons attached thereto, that had been delivered to said Joseph E. Young and Company as aforesaid, and interest on said coupons and bonds after their maturity at the rate of six per cent. per annum on coupons and ten per cent. on bonds; and for such other and further

relief as to your honors shall seem meet, and agreeable to equity and good conscience.

And, further, that a summons may issue commanding said Chicago, Danville and Vincennes Railroad Company and said receiver, A. S. Dunham, and said Town of St. Anne to appear at the next term of this court to answer this bill, etc.; and your orators will ever pray, etc.

JOHN H. STEBBINS.
EDWARD G. JUDSON.
34 WILLIE AMOS TENNEY.
SUTHERLAND TENNEY.
WILLIAM D. JUDSON.
AMOS TENNEY.

ROBERT DOYLE AND
THOMAS S. McCLELLAND,
Solicitors and of Counsel for said Complainants.

Endorsed: Filed June 25, 1884. Wm. H. Bradley, clerk.

35 On the same day, to wit, on the twenty-fifth day of June, A. D. 1884, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to The Town of St. Anne, Kankakee county, Illinois; The Chicago, Danville and Vincennes Railroad Company, and A. S. Dunham, Receiver of The Chicago, Danville and Vincennes Railroad Company, Greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of August next, to answer the bill of complaint of John H. Stebbins *et al.*, this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the
36 Supreme Court of the United States of America, at Chicago aforesaid, this 25th day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above named defendants are notified that unless they, and each of them, shall enter their appearance in the clerk's office of

said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainants' bill will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ within my district in the following manner, to wit: Upon The Town of St. Anne by delivering a true copy of this writ to A. Pallissard, supervisor of said town therein named, on the 2 day of July, A. D. 1884, by personally delivering to him a true copy of the same on the aforesaid day.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *Deputy.*

Endorsed: Filed July 17, A. D. 1884. Wm. H. Bradley, clerk.

37 Afterwards, to wit, on the thirtieth day of July, 1884, came the defendant, by its solicitors, and filed in said clerk's office, its appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court. To the First Monday in August, 1884. In Chancery.

JOHN H. STEBBINS *et al.*
vs.
THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS, *et al.*

The appearance of the Town of St. Anne, Kankakee county, Illinois, is hereby entered in the above-entitled suit, and the clerk is requested to enter the appearance of said defendant, by its solicitors, in the order book as provided by rules of court.

Kankakee, Ills., July 29th, 1884.

THOS. P. BONFIELD,
H. LORING,
C. R. STARR,
Sol's for the Town of St. Anne.

Endorsed: Filed July 30th, 1884. Wm. H. Bradley, clerk.

38 Afterwards, to wit, on the twenty-sixth day of August, 1884, came, The Town of St. Anne, by its solicitors, and filed in said clerk's office its demurrer to the bill in said entitled cause, which said demurrer is in the words and figures following, to wit:

39 *The Demurrer of The Town of St. Anne, Kankakee County, Illinois, one of the Defendants to the Bill of Complaint herein filed by the said Complainants.*

In the Circuit Court of the United States of America, Northern District of Illinois. July Term, A. D. 1884. In Chancery.

THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS,
vs.
JOHN H. STEBBINS, WILLIAM D. JUDSON, AMOS TENNY, EDWARD G. JUDSON, WILLIE AMOS TENNY, & SUTHERLAND TENNY.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows that the complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery or relief from or against this de-
40 fendant, The Town of St. Anne, touching the matters contained in said bill, or any of such matters.

And this defendant, The Town of St. Anne, shows as further causes of demurrer to said bill—

1st. There is a misjoinder of parties plaintiff.

The complainants, William D. Judson and Amos Tenny, who were partners with Joseph E. Tenny in the firm of Joseph E. Tenny & Company, are shown in said bill to have assigned all their interest in the claim of said Joseph E. Tenny & Co. against the Town of St. Anne, and so having assigned their interest they are not proper parties with said assignees.

2nd. The said bill is double in this—that the complainants, John H. Stebbins, William D. Judson, and Amos Tenny, claim to have a judgment against the Chicago, Danville & Vincennes R. R. Company, and seek to have the alleged indebtedness of the Town of St. Anne to said R. R. Co. applied upon said judgment; and by the same bill it is alleged that John H. Stebbins is the owner of J. E. Tenny's interest, Edward J. Judson is owner of William D. Judson's interest, and Willie Amos Tenny & Sutherland Tenny are owners of Amos Tenny's interest, and asks to have the said indebtedness paid to them.

41 3rd. It is alleged in said bill that Joseph E. Tenny & Co., by contract with said railroad company, were entitled to the bonds of said Town of St. Anne as soon as the road was completed in December, 1870; and it is not shown by said bill that they ever made any claim for said bonds until September, 1877, at which time it is shown by said bill said Joseph E. Tenny & Co. had parted with all their interest in said claim against the Town of St. Anne to John H. Stebbins, Edward G. Judson, Willie Amos Tenny, & Sutherland Tenny. And it is not shown by said bill that said assignees ever made any claim for said alleged indebtedness or bonds until they were made parties in the amendment to the bill dismissed in this court June 2nd, 1884, although their interest is said to have been obtained in the spring of 1876. And it is not shown by said bill

that said Chicago, Danville & Vincennes Railroad Company ever brought any suit for said bonds until they were joined with J. E. Tenny & Co. in a suit in September, 1877.

4th. It is shown by said bill that Luther H. Pierce, as receiver of the estate of Joseph E. Tenny, sold by order of court the claim of said Tenny against the Chicago, Danville & Vincennes Railroad Company one for $600,000 and one for $300,000, and that said John H. Stebbins became the purchaser of said claims; but it is nowhere shown in said bill that said John H. Stebbins ever became the owner in any way of any claim which said Tenny had or pretended
42 to have against the Town of St. Anne, and there is no case stated or shown in said bill by which said Stebbins has succeeded to the interest of said Tenny, if any he ever had, against said Town of St. Anne.

5th. The claims sold to Stebbins are, as alleged, claims against the Chicago, Danville & Vincennes Railroad Company. The claims alleged to have been assigned by William D. Judson and Amos Tenny are claims against the towns of Beaver, St. Anne, and Sumner. There is therefore no unit of interest between these alleged assigns and successors of Joseph E. Tenny & Co.

6th. According to the allegations in the bill an assignment was made by two of the firm of Joseph E. Tenny & Company, namely, William D. Judson and Amos Tenny, of all their interest in the claim against the Town of St. Anne, and Joseph E. Tenny still retains his. The receiver of Joseph E. Tenny sold Joseph E. Tenny's interest in the claims against the Chicago, Danville & Vincennes Railroad Company, and William D. Judson and Amos Tenny still retain theirs. As this bill now stands, by its averments and exhibits, Joseph E. Tenny still retains his interest against the Town of St. Anne under the alleged contract with the railroad company, and yet he is not a party to the bill. The averments as to the interests of parties and ownership of the pretended claim are all incon-
43 sistent and contradictory, by which the said bill is rendred uncertain and unintelligible, and fails to show any joint cause of action by these complainants in a court of equity.

7th. It appears by said bill that the aid voted, as alleged, to the Chicago, Danville & Vincennes Railroad Co. was in the nature of a donation and not a subscription for stock, and the defendant submits that after the adoption of the constitution of 1870 the town cannot be compelled to issue bonds or levy a tax under the laws of 1867, referred to in said bill.

8th. The averment in said bill that the town authorities audited the claim of the railroad company Dec. 19th, 1869, does not help the complainants in their alleged cause of action in chancery, but precludes them, inasmuch as it shows an indebtedness to the railroad company which, if valid, would enable them to bring their action at law in the names of the railroad company for their use. And complainants' action should be at law and not in chancery.

9th. The averment in said bill (if it was true) that Leon Mailloux, supervisor, acting for the town authorities, delivered the bonds to Joseph E. Tenny & Co., and that they were then redelivered to him to be registered, and afterwards were replevined and destroyed, does

not give the said Joseph E. Tenny & Co. or their assigns any standing in a court of chancery. Leon Mailloux, as supervisor,
44 could not be the agent of J. E. Tenny & Co., and the town would not be bound by anything Leon Mailloux did as the agent of said Tenny & Co. But it shows that if they have any action it would be an action at law for the amount of the indebtedness, either in the name of said Joseph E. Tenny & Co. or in the name of the C., D. & V. R. R. Co. for the use of the parties entitled to the judgment. And defendant says that said complainants have no standing in equity by reason of said averments.

10th. The copy of the bonds, as given in the bill, shows upon its face as obligation that would not be valid or binding upon the Town of St. Anne. And the alleged record of the town meeting is void, because not signed by the moderator or presiding officer, as required by the law in such cases.

11th. The allegation in said bill, that on the 7th day of September, 1877, Joseph E. Tenney and Company and the Chicago, Danville and Vincennes Railroad Company filed their bill in the circuit court of Kankakee county and State of Illinois, to recover these bonds and this alleged indebtedness. And that upon demurrer the bill was dismissed, and that said demur was affirmed by the appellate court and the superior court of the State affirmed the same; also, November 10th, 1881, upon the ground that the complainants, if they had any cause of action, should enforce their remedy at law, upon its face shows that the complainants in this case have
45 no standing in a court of equity, and that the demurrer should be sustained in this court as in the supreme court of the State, for the same reasons.

12th. The attempt to give a court of chancery jurisdiction of this case by the alleged judgment of Joseph E. Tenny & Co. against the Chicago, Danville & Vincennes Railroad Company, and the return of execution, etc., is a failure upon the face of it, because the bill alleges and claims that said Joseph E. Tenny & Co. had a right to this indebtedness of the town to the R. R. Co. by contract. And that two of the members of said firm had assigned all their interest in the claim against said town to other parties before this judgment was obtained. And the other party in said firm had lost all his interest in any claim against the said R. R. Co. before suit was brought or judgment obtained.

And secondly, to apply this claim against the town upon the judgment against the R. R. Co. would be to take the claim from Edward G. Judson, Willie Amos Tenny, & Sutherland Tenny to whom Wm. D. Judson and Amos Tenny assigned, and apply it in satisfaction of the judgment which is still owned by said assignees.

13th. This bill avers that Feb'y 2nd, 1869, the R. R. Co. entered into a contract with Tenny & Co. that in consideration of
46 constructing the road, the R. R. Co. set over all donations, bonds, or aid which had been or might be made, by municipalities, etc. The vote for these bonds by the Town of St. Anne is alleged to have been taken in June, 1869, and the road completed Dec. 1st, 1870. It so appears from the bill that at the time the contract was made no vote had been taken, no bonds signed, and on

steps of any kind towards a donation from the town, so that Tenny & Co. got no title to bonds or donations from the railroad company by virtue of the contract, because no donations or aids existed at that time which the railroad company could assign in equity or otherwise. And the railroad company having nothing to assign at that time, complainants could acquire no title through them to be enforced in a court of equity.

14th. The bill recites that "the town authorities audited the claims of the company," the vote being for a donation, and the donation not having been carried into effect it had no vitality, and hence, there being no claim, there was nothing to audit; and if the town authorities went through the form of auditing it could make no difference, and has no greater force than a promise to give or donate, which would have no vitality until carried into effect.

The bill recognizes as a fact that the supervisor was not the authority to make a donation, or carry into operation the dona-
47 tion, or carry into effect the vote. If that be the case, then "the town authorities" were the ones to execute the bonds, to raise moneys, and, it being a personal trust or confidence or duty imposed upon them by law, they could not delegate the authority to the supervisor, and his act in signing bonds would be a nullity.

15th. The law required the minutes of the town meeting at which this election was held, as alleged in said bill, to be subscribed by "the clerk of said meeting and by the presiding officer." and to be "filed in the office of the town clerk within two days after such town meeting."

Gross Statutes, page 748, sec. 14.

The act of March 24th, 1869, under which the bill claims a special town meeting voted aid to this R. R. Co., requires the election to be conducted and canvassed and returned the same as at other town elections.

Private Laws of 1869, vol. 3, page 357, sec. 3.

It does not appear, from the certificate of the "town clerk," made a part of this bill, that the proceedings of this election were signed by the "clerk of said meeting," or by the "presiding officer," or that the special town meeting was held at the place required by law, namely, "at the place were the last town meeting was held."

Gross Statutes, page 746, sec. 9.

48 Nor does it appear that the "persons" who "voted for said tax" were "legal voters" as provided by section 2 of the law of 1869, under which the election is claimed; nor does it appear, from the certificate of the "town clerk," that the minutes of said election were returned to his office and filed therein within two days after said election, or at any other time; nor does it appear that the requisite notice was given, and, in many other respects, it appears upon the face of said bill that the election was not held in compliance with the law in such cases made and provided, and that said pretended election was illegal and void.

16th. It is alleged in the bill that said Joseph E. Tenny & Co. obtained a judgment against the railroad company for the amount of their claims for building the railroad. That being the case, all equitable claims growing out of the contract would be merged in

that judgment at law, and would, in effect, be a repudiation of all claims or donations that might be made. Having received a judgment they could not set up a claim upon an executory contract for outside donations and aids which were to have been received in liquidation of the claim upon which the judgment is based. They cannot claim in the same bill that they are entitled to these bonds, by reason of their contract with the company, and also claim,
49 in the nature of a creditor's bill, to have them applied upon their judgment, as the two claims are inconsistent, and in this case one view favors one set of complainants and the other view another set of complainants.

17th. And for a further cause of demurrer this defendant shows that it appears from the law cited in complainants' bill, under which it is alleged aid was voted to said railroad company, that it was the duty of "the town authorities" to determine whether a tax should be levied, or whether they would borrow money and issue bonds of said town, drawing interest, not exceeding ten per cent., payable annually or semi-annually, and sell them at such time and place as they might deem best, and levy and collect taxes to pay said bonds; but said bill alleges that the vote taken prescribed that the aid should "be paid in bonds of said town, bearing interest, not exceeding ten per cent., payable in installments, as follows, to wit, $1,000 in 1871, $2,000 in 1872, $3,000 in 1873, $4,000 in 1874, and $5,000 per year from 1875, till said $30,000 be paid." And said defendant says that it appears upon the face of said bill that the voting of aid payable in bonds drawing interest was not authorized by law and would take from the "town authorities" the discretion vested in them by the law of levying a tax to pay the aid voted, and said vote is therefore unauthorized, illegal, and void.

50 18th. And for a further cause of demurrer this defendant shows that it appears by the complainants' bill that the said railroad company, by its contractors, finished the said railroad through the Town of St. Anne by the first of December, 1870, and, as alleged in said bill, said indebtedness to said railroad company then accrued, and at the time of filing this bill the said railroad company was barred from any recovery against said defendant by the statutes of limitations and lapse of time, and nothing is shown in said bill that places these complainants in any better condition than the said railroad company, from whom they claim to have demur title. And this defendant insists that by laches, lapse of time, and the statutes of limitations the claim is barred in equity against the complainants in this bill. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether the said defendant, The Town of St. Anne, shall be compelled to make any further or other answer to the said bill. And said Town of St. Anne prays to be hence dismissed, with reasonable costs in the behalf sustained.

C. R. STARR,
H. LORING,
THO. P. BRUFIELD,
Solt's for The Town of St. Anne.

51 We certify that, in our opinion, the foregoing demurrer of The Town of St. Anne, defendant, to the bill of complaint of John H. Stebbins *et al.* complainants, is well founded in law and proper to be filed in the above case.

C. R. STARR,
H. LORING,
THO. P. BURFIELD,
Sol's for The Town of St. Anne.

52 UNITED STATES OF AMERICA, *Northern District of Illinois:*

Joseph Pallissard, who is supervisor of The Town of St. Anne, defendant, on oath states: That he has heard read the foregoing demurrer to the bill of complaint of John H. Stebbins and others in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

JOSEPH PALLISSARD,
Supervisor of said Town of St. Anne.

Subscribed and sworn to by said Joseph Pallissard, supervisor of The Town of St. Anne, before me, a notary public in and for the county of Kankakee, State of Illinois, as witness my hand and notarial seal, this 20th day of August, A. D. 1884.

[SEAL.] HARRISON LORING,
Notary Public.

Endorsed: Filed Aug. 26th, 1884. Wm. H. Bradley, clerk.

53 Afterwards, to wit, on the twenty-sixth day of January, 1865, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, *State of Illinois:*

Circuit Court, Northern District of Illinois, Dec. Term, A. D. 1884.

JOHN H. STEBBINS, WILLIAM D. JUDSON, AMOS TENNEY, and SUTHERLAND TENNEY
vs.
TOWN OF ST. ANNE.

It is hereby stipulated by the complainants and The Town of St. Anne, defendant, that the demurrer to the bill in this cause shall be heard on printed briefs.

D'f't to present *their* briefs to-day, and the complainants to reply within two weeks, and then def't to have two weeks to reply.

Dated Jan. 26th, 1885.

H. LORING,
Sol'r for Def't, St. Anne.
ROBERT DOYLE AND
THOS. McCLELLAND,
Counsel for Compl's.

Endorsed: Filed Jan'y 26, 1885. Wm. H. Bradley, clerk.

54 Afterwards, to wit, on the fourth day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

In Chancery.

JOHN H. STEBBINS, EDWARD G. JUDSON, WILLIE AMOS TENNEY, Sutherland Tenney, and William D. Judson and Amos Tenney, doing business under the name and style of Joseph E. Young & Company,

vs.

THE TOWN OF ST. ANNE, KANKAKEE COUNTY, ILLINOIS, THE CHICAGO, Danville and Vincennes Railroad Company, and A. S. Durham, Receiver of The Chicago, Danville and Vincennes Railroad Company.

The demurrer of the Town of St. Anne, defendant, to the complainants' bill herein, having been heretofore submitted to the court by the solicitors of the respective parties herein upon briefs under stipulation filed, and the court, having considered the matters therein set up, and being sufficiently advised in the premises as to said demurrer, sustains the same.

It is thereupon ordered and adjudged that said cause be, and the same is hereby, dismissed for want of equity at the costs of
55 said complainants, and that execution issue.

Thereupon the complainants pray an appeal herefrom to the Supreme Court of the United States, which is allowed upon their filing a bond in the penal sum of five hundred dollars within thirty days, to be approved by the court.

Afterwards, to wit, on the third day of June, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

In Chancery.

JOHN H. STEBBINS *et al. vs.* TOWN OF ST. ANNE *et al.*

On motion of complainants, by T. S. McClelland, their solicitor, it is ordered that the time to file an appeal bond herein be extended thirty days.

56 Afterwards, to wit, on the twenty-seventh day of June, 1885, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, John H. Stebbins, Ed-

ward G. Judson, Willie Amos Tenney, Sutherland Tenney, and William D. Judson and Amos Tenney, late with Joseph E. Young, as Joseph E. Young and Company, as principals, and Frances M. Doyle & James E. Munroe, as sureties, are held and firmly bound unto The Town of St. Anne, The Chicago, Danville and Vincennes Railroad Company, and A. S. Dunham, receiver of said railroad company, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 20th day of June, A. D. 1885.

The condition of the above obligation is such that whereas, on the 4th day of May, A. D. 1885, in the circuit court of the United States for the northern district of Illinois, a decree was entered dismissing the bill of complaint in a certain cause then depending in said court, wherein said John H. Stebbings, Edward G. Judson, Willie Amos Tenney, Sutherland Tenney, William D. Judson, and
57 Amos Tenney were complainants and said The Town of St. Anne, The Chicago, Danville and Vincennes Railroad Company, and A. S. Dunham, receiver, were defendants, from which decree said complainants prayed an appeal to the Supreme Court of the United States, which was allowed:

Now, therefore, if said appellants shall prosecute their appeal with effect, and, if they shall fail to make their plea good, shall answer all damages and costs, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN H. STEBBINS, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

EDWARD G. JUDSON, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

WILLIE AMOS TENNEY, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

SUTHERLAND TENNEY, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

WILLIAM D. JUDSON, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

AMOS TENNEY, [SEAL.]
By THOMAS S. McCLELLAND,
His Att'y.

FRANCES M. DOYLE. [SEAL.]
JAMES E. MUNROE. [SEAL.]

Approved. H. W. BLODGETT, *Judge.*

Endorsed: Filed June 27, 1885. Wm. H. Bradley, Clerk.

58 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein John H. Stebbins, Edward G. Judson, Willie Amos Tenney, Sutherland Tenney, and William D. Judson and Amos Tenney, doing business under the name and style of Joseph E. Young and Company, are the complainants, and The Town of St. Anne, The Chicago, Danville and Vincennes Railroad Company, and A. S. Dunham, receiver of The Chicago, Danville and Vincennes Railroad Company, are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this seventh day of July, 1885.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 882. John H. Stebbins, Edward G. Judson, Willie Amos Tenney, Sutherland Tenney, William D. Judson, and Amos Tenney, doing business as Joseph E. Young & Company, appellants, *vs.* The Town of St. Anne, Kankakee county, Ill.; The Chicago, Danville and Vincennes Railroad Company, and A. S. Dunham, receiver of said railroad company. Filed July 13, 1885.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885.

JOHN H. STEBBINS ET AL., *Appellants*,

vs.

THE TOWN OF ST. ANNE ET AL., *Appellees.*

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF FOR APPELLANTS.

THOMAS S. McCLELLAND,

Counsel for Appellants.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1885.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1885.

JOHN H. STEBBINS ET AL.,
Appellants,

vs.

THE TOWN OF ST. ANNE ET AL.,
Appellees.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF FOR APPELLANTS.

By this bill, John H. Stebbins, as assignee of Joseph E. Young, seeks to recover one-third, or J. E. Young's interest, of the $30,000 bonds, issued by the town of St. Anne and delivered to Joseph E. Young & Co., and afterwards burnt by fraud of the town.

Edward G. Judson seeks to enforce a trust and recover William D. Judson's one-third interest in the bonds, to the extent of the debt from William D. to Edward G. Judson, secured by assignment of William D. Judson's interest in the bonds.

Willie Amos and Sutherland Tenney seek to enforce a trust and recover Amos Tenney's one-third interest in

the bonds, to the extent of the debt due from Amos Tenney, and secured by his assignment of that interest in the bonds.

Amos Tenney and William D. Judson, after satisfaction of their debts, claim any balance that may be recovered.

The firm of Joseph E. Young & Co. was composed of Joseph E. Young, William D. Judson and Amos Tenney.

Joseph E. Young claims no interest in the bonds, his entire interest having passed by receiver's and assignee's deeds to John H. Stebbins.

Brief of the Allegations of the Bill.

In 1852 the town of St. Anne was incorporated under the Township Organization act of Illinois.

On March 7, 1867, the Legislature of Illinois authorized this town, with other municipalities on the line of the Chicago, Danville & Vincennes Railroad, to appropriate such sum of money as it might elect to aid in the construction of that road. Private Laws of Illinois of 1867, vol. 1, page 842.

On March 24, 1869, the same Legislature passed another act, authorizing this town and other municipalities on the line of this road to contribute toward constructing the road, and to issue bonds to pay such contribution. Private Laws of 1869, vol 3, page 356. (*Record, pp. 4, 5.*)

On February 2, 1869, Joseph E. Young, Wm. D. Judson, and Amos Tenney—as Joseph E. Young & Co.—entered into a contract to build and equip this railroad from Danville, Ill., through the town of St. Anne to Chicago, and in part payment therefor agreed to accept from

the railroad company all bonds and aids issued, or to be issued, by the municipalities on the line of the road, and did take a legal transfer and assignment of all such bonds and aids issued or to be issued, entered at once on their contract, and by December 1, 1870, completed the road. (*Record, pp. 6, 7.*)

On May 24, 1869, the supervisor, town clerk, one justice and twelve freeholders of the town of St. Anne, petitioned for an election to vote $30,000 towards the construction of this road, to be paid in town bonds, bearing ten per cent., the election to be held June 5, 1869. (*Record, pp. 7 and 8.*)

On May 25, 1869, the town clerk posted five notices of the election in five most public places in the town. Notice given in full on pages 9 and 10 of the record.

On June 5, 1869, the election was held in pursuance of the petition and notice, and a majority voted in favor of donating $30,000 in aid of the railroad, to be paid in bonds, as designated in the petition and notice. The result of the election, as shown upon the records of the town, appear in full on page 11 of this record.

By December 1, 1870, Joseph E. Young & Co. fully completed the road from Danville to Chicago, in accordance with their contract, and through the points in the town of St. Anne designated in all the proceedings relative to aiding the road, whereby the donation became fully due and payable to Joseph E. Young & Co., by a delivery of the bonds. (*Record, p. 12.*)

On December 19, 1870, the authorities of St. Anne audited the claim, and directed the supervisor to issue the bonds in conformity with the vote and former action of the people of the town, and on December 24, 1870, the supervisor executed thirty bonds, of $1,000 each, payable

$1,000 in July, 1871; $2,000 in July, 1872; $3,000 in July, 1873; $4,000 in July, 1874, and $5,000 in July of each of the years 1875 to 1878, inclusive, as directed by the town board. (*Record, p. 13.*)

On pages 14 and 15 of the record may be found a copy of one of the bonds and one coupon.

On December 27, 1870, the supervisor, by direction of the town authorities, carried these bonds and coupons to Chicago and delivered them, as executed, to Joseph E. Young & Co., who became the absolute owners of the same under their contract with the railroad company. (*Record, pp. 15, 16.*)

After the delivery of these bonds to Joseph E. Young & Co. by the supervisor of the town of St. Anne, Young & Co. redelivered them to the supervisor for the purpose of having him make the necessary affidavit and registering the bonds under the act of April 16, 1869, and the supervisor undertook to take the same to Springfield and register in the auditor's office, and return the same after registering. On his way to Springfield the supervisor stopped at St. Anne, and while there one Francis Coyer and other citizens of that town, as tax-payers, filed their bill in chancery in the Circuit Court of Kankakee County, Illinois, wherein this town is situated, against the supervisior and other town officers and the railroad company, and procured a temporary injunction enjoining the redelivery of the bonds. The injunction was served January 5, 1871. During the pendency of this suit the court ordered the bonds placed in custody of the clerk of court. The case was prosecuted to the Supreme Court of Illinois, where the bonds were held valid, and on April 4, 1876, the bill was dismissed in the Kankakee Circuit Court and the injunction dissolved. This case is reported as *C., D.*

& V. R. R. Co. v. *Coyer et al.* 79 Ill. 373. (*Record, pp. 16, 17.*)

On April 7, 1876, and while the bonds were still in the custody of the Kankakee County Circuit Court Clerk, Joseph Guertin, the then supervisor of St. Anne, took out a writ of replevin from the office of a justice of the peace, and got possession of the bonds from the circuit clerk. The replevin writ was made returnable on April 15, 1876, but on April 8, 1876, the next day after replevying the bonds, and seven days before the return day of the writ, the town authorities destroyed all of the bonds by burning, except bond No. 4, which had not been seized, a copy of which appears on page 7 of the printed record. (*Record, pp. 17, 18, 19, 20 and 21.*)

On September 7, 1877, Joseph E. Young & Co. instituted a proceeding in the Circuit Court of Kankakee County, on the chancery side, against the town of St. Anne, for the purpose of having it reissue the bonds which had been burned in April, 1876. This bill was dismissed without prejudice in 1880. (*Record, pp. 21 and 22.*)

On August 1, 1883, Joseph E. Young & Co. filed their bill, in the Circuit Court of the United States for the Northern District of Illinois, against St. Anne, to recover on these destroyed bonds; but it appearing that Joseph E. Young had no interest in the bonds, and that his partners had assigned their respective interests in trust for the payment of debts owed by them, that bill was dismissed on June 2, 1884, without prejudice to the rights of any persons interested in the bonds. (*Record, pp. 21 and 22.*)

That since December 19, 1870, the day the town board of auditors audited the claim and directed the bonds to be issued, Joseph E. Young & Co., and those claiming under them, have persistently asserted their right to the

possession of the bonds or their value, and that the validity of the bonds have been fixed by the Supreme Court of Illinois in *C., D. & V. R. R. Co.* v. *Coyer*, 79 Ill., 374. *(Record, pp. 23, 24.)*

On May 20, 1875, the C., D. & V. R. R. Co. was placed in the hands of a receiver, and that the defendant, A. S. Dunham, is such receiver. That in 1875 the receiver reported to the Circuit Court of the United States for the Northern District of Illinois that there was due Wm. D. Judson and Amos Tenney, partners of Joseph E. Young, $588,536.10, balance due for constructing the road. *(Record, pp. 23, 24.)*

That John H. Stebbins is the real, equitable owner of the interest of Joseph E. Young in the bonds in controversy, and all demands against the C., D. & V. R. R. Co. for constructing that road.

That Edward G. Judson is the real, equitable owner of the interest of Wm. D. Judson in same property to the extent of the debt owing by Wm. D. to Edward G. Judson.

That Willie Amos Tenney and Sutherland Tenney are the real, equitable owners of the interest of Amos Tenney to the extent of the demand of Willie Amos and Sutherland Tenney against Amos Tenney; and that Wm. D. Judson and Amos Tenney would be entitled to any overplus after the enforcement of the trust and the payment of the debts.

That Stebbins derived title to the interest of Young in the claim of Joseph E. Young & Co. against the C., D. & V. R. R. Co. and the town of St. Anne on account of these bonds: First, through Luther H. Pierce, receiver of the estate of Jos. E. Young, in the Circuit Court of Cook County, Illinois, in 1876; and, second, through

said Pierce as assignee in bankruptcy. (*Record, pp. 24, 25, 26.*)

That Edward G. Judson derived his title to an interest in the claim of William D. Judson against the town of St. Anne, through an instrument of trust, dated February 8, 1876, and appearing in full on pages 26 and 27 of record.

That Willie Amos Tenney and Sutherland Tenney derived their title to an interest in the claim of Amos Tenney against the town of St. Anne through an instrument of trust, dated March 9, 1876, copied in full on pages 28 and 29 of the record.

On November 30, 1877, Joseph E. Young & Co. recovered a judgment in the Circuit Court of Iroquois County, Illinois, against the Chicago, Danville and Vincennes Railroad Company, for $588,556.10, balance due for constructing the road from Danville to Chicago and through St. Anne, the equity to one-third of which was in Stebbins, and the other two-thirds belonged to William D. Judson and Amos Tenney, subject to the trusts in Edward G. Judson and Willie Amos and Sutherland Tenney; and that execution was issued on that judgment December 21, 1877, and returned by the sheriff of Iroquois County, *nulla bona*, and no part satisfied, and that said judgment is still wholly unpaid. (*Record, pp. 29 and 30.*)

That said the town of St. Anne is indebted to the railroad company under its donation, or to Joseph E. Young & Co., by reason of its delivery of the bonds to Young & Co. under their contract with the railroad company, to receive these bonds in part payment for the construction, in the sum of $30,000 and interest at 10 per cent. from December 27, 1870, date of delivery of the bonds, with 6 per cent. interest on the coupons from respective dates of their maturity.

That Joseph E. Young & Co. built the C., D. & V. R. R. and equipped the same, as before alleged, in accordance with their contract, and that that road is in the hands of a receiver. *(Record, p. 31.)*

The bill prays that Stebbins, Edward G. Judson, and Willie Amos and Sutherland Tenney may be decreed to be the owners of the claim of Joseph E. Young & Co. against the town of St. Anne, to the extent of their respective interests therein, in and to the lands in controversy, and that they be subrogated to the rights of Joseph E. Young & Co. to the measure of such interests, in the judgment against the railroad company in Iroquois County, and through such judgment to any equitable assets in the hands of the defendant town. *(Record, p. 32.)*

That inasmuch as the entire issue of bonds are due, the rights of complainants have become fixed, as well as the liability of the town of St. Anne to pay the $30,000 and interest; the complainants pray for a decree for the amount due and the money distributed among the parties as to equity appertains. *(Record, pp. 32 and 33.)*

The Chicago, Danville and Vincennes Railroad Company and its receiver are made formal defendants, in order that they may set up any rights they may have, as being connected with the history of the litigation.

To this bill the defendant, the town of St. Anne, filed a general and eighteen (18) special grounds of demurrer.

NOTE—Counsel for the town of St. Anne, in their statements of fact, have not followed the allegations of the bill, which they were bound to do for the purposes of their demurrer. They have no right to set up a different state of facts from those alleged in the bill.

BRIEF OF THE SPECIAL GROUNDS OF DEMURRER.

First—A misjoinder of parties plaintiff—in this, that Wm. D. Judson and Amos Tenney having assigned their interest, are not proper parties. *(The bill alleges that these assignments were merely to extent of covering and paying certain debts; Wm. D. Judson and Amos Tenney would be entitled to any residue after payment of the debts.)*

Second—The bill is double, in this, that Stebbins, Wm. D. Judson, and Amos Tenney claim to have a judgment against the C., D. & V. R. R. Co., and seek to have the indebtedness of the town applied on said judgment, and by the same bill it is alleged that Stebbins is owner of J. E. *Tenney's* (*Young* must be meant) interest; Edward G. Judson is owner of Wm. D. Judson's interest; Willie Amos and Sutherland Tenney are owners of Amos Tenney's interest, and ask to have the indebtedness paid to them.

(The bill makes no such allegations. Stebbins was not a party to the judgment, and so far as the judgment is concerned Stebbins' interest is that of assignee through Young, and Edward G. Judson and Willie Amos and Sutherland Tenney have only an interest to the extent of debts due them, which they seek to work out in this bill, Wm. D. Judson and Amos Tenney claiming the balance.)

Third—That Joseph E. *Tenney* (*Young*) & Co. were entitled to the bonds, under their contract with the railroad company, as soon as the road was completed, yet never asserted their title to the bonds until in September, 1877, at which time Joseph E. *Tenney* (*Young*) & Co. had parted with their interest in the claim against St. Anne. That the bill does not show that the assignees ever made

any claim to the debt or bonds until they were made parties in the amendment to the bill dismissed June 2, 1884. The bill does not show that the Chicago, Danville and Vincennes Railroad Company ever brought suit for the bonds until they were joined with J. E. Tenney (Young) & Co. in a suit in September, 1877. (*From the time the bonds were delivered to Joseph E. Young & Co., in December, 1870, until April 4, 1876, when the Coyer et al. v. C., D. & V. R. R. Co. et al. bill was dismissed, the validity of the bonds were in question, the people of the town seeking to have them declared invalid by the courts of Illinois. Since that time, Joseph E. Young & Co., by themselves or in connection with their assigns, have continuously sought to recover the bonds or their value. The bill herein says nothing about these assignees being made parties to the bill dismissed June 2, 1884. They were not parties to that bill.*)

Fourth—That Pierce, as receiver of the estate of Jos. E. *Tenney (Young)*, sold his claim against the C., D. & V. R. R. Co., and Stebbins became purchaser, but bill does not show that Stebbins became the owner of *Tenney's (Young's)* claim against the town of St. Anne.

(*The property Stebbins bought was Young's interest in the balance due Joseph E. Young & Co. for building the road, including all donations as collateral, to which Young & Co. were entitled. The question of the validity of these bonds was before the Illinois courts at the time, and subsequently Stebbins bought from Young's assignee in bankruptcy all his assets.*)

Fifth—The claims sold to Stebbins were claims against the C., D. & V. R. R. Co. Those assigned to

Wm. D. Judson and Amos Tenney were claims against the town of St. Anne, etc.

(*Same in effect as fourth ground of demurrer.*)

Sixth—Joseph E. *Tenney (Young)* still retains his interest against the town of St. Anne.

(*Bill does not so allege. This demurrer same in effect as No. 4.*)

Seventh—The aid voted was a donation and not a subscription to the stock, and under the Constitution of 1870 the town cannot be required to issue bonds.

(*The bill alleges that the bonds were issued under act of March 7, 1867; act of March 24, 1869, authorizing issue of bonds; vote of June 5, 1869, and that the Supreme Court of Illinois held bonds valid in Coyer v. C., D. & V. R. R. Co.*, 79 Ill. 374.)

Eighth—The town board of auditors having on December 19, 1869 (1870), audited the donation in favor of the railroad company, whereby it became the debt due the railroad company, the action should be in name of that company and at law.

(*The auditing of the donation in favor of the railroad company was subsequently merged into bonds and delivered to Joseph E Young & Co., who became absolute owners.*)

Ninth—The delivery of the bonds by the supervisor to Joseph E. Young & Co., and by them redelivered to the supervisor for registry in auditor's office, and afterwards replevied and burnt, would not give J. E. *Tenney* (*Young*) & Co. a standing in a court of equity.

(*By subsequent assignments trusts were created, and the relations of all the parties are such that only a*

court of equity can adjust and settle the rights of the parties.)

Tenth—The bonds, on their face, as shown by the copy in bill, are void. The town meeting was void, because not signed by the moderator.

(*Illinois Supreme Court held the bonds valid.*)

Eleventh—Because Jos. E. *Tenney* (*Young*) & Co. had a bill in chancery, filed September 7, 1877, and same dismissed November 10, 1881, for want of equity, the State court holding their action should have been at law—precludes complainants in this case from suing in chancery.

(*The relations of complainants herein to the town of St. Anne, and the relations of Jos. E. Young & Co. to same town by their bill in 1877, are wholly different. The question of what was the proper action only involved in that case; merits not passed upon.*)

Twelfth—A court of chancery has no jurisdiction in this case on ground of the judgment of J. E. *Tenney* (*Young*) & Co. against the C., D. & V. R. R. Co. and return of execution, etc., because the claims of J. E. *Tenney* (*Young*) & Co. to the bonds was by contract, and two members of the firm had assigned their interest in the bonds before the judgment was recovered, and the other member of the firm had lost his interest before the judgment was recovered; and, second, to apply this claim against the town upon the judgment against the railroad company would be to take the claim from E. G. Judson, Willie Amos Tenney and Sutherland Tenney, to whom Wm. D. Judson and Amos Tenney assigned, and apply it in satisfactlon of the judgment still owned by the assignees.

(*The interest of the several parties in this suit to*

the judgment, and the claim against this town on the bonds issued by it and afterwards destroyed, are so intermingled and connected that they must necessarily be adjusted in one action, and in that branch of the court having power to settle the rights of the parties.)

Thirteenth—The bill avers that on February 2, 1869, the railroad company contracted with *Tenney* (*Young*) & Co. to construct the road and take all donations in part payment. The vote in St. Anne was taken on June 5, 1869, and the road completed December 1, 1870; so at the time the contract was made no vote was taken or bonds issued, so *Tenney* (*Young*) & Co. took no title to the donation or bonds under the contract.

(*Their title become perfected, under the contract, by the delivery to them of the bonds December 27, 1870.*)

Fourteenth—On the face of the bill, "the town authorities audited the claims of the company." The vote being for a donation, and the douation not having been carried into effect, it had no vitality. The supervisor had no authority to make a donation or carry into effect the donation or vote. The bonds should have been signed by "the town authorities."

(*The bill alleges that the vote was carried into effect by the town board of audit directing the supervisor to execute and deliver the bonds, which was done.*)

Fifteenth—The minutes of the town meeting at which the bonds were voted were not subscribed by the clerk of the meeting and the presiding officer, and filed in the office of the town clerk within two days, as provided by law, or held at the place provided by law, or that the persons voting were "legal voters."

(*These questions were settled by the Supreme Court*

of Illinois, in Coyer v. C., D. & V. R. R. Co., 79 Ill., and other cases cited in brief and argument.)

Sixteenth—*Tenney* (*Young*) & Co. having merged their claim against the railroad company into a judgment, any equitable claims growing out of their contract with the railroad company for aids would be repudiated. They could not claim on the judgment and upon the contract for these collaterals at same time, which were to be received by them in part payment for building the road.)

They (Young & Co.) cannot claim the bonds under their contract with the railroad company, and also claim, in the nature of a creditor's bill, to have them applied on the judgment.

(This demurrer is a repetition of former ones.)

Seventeenth—That voting aid payable in bonds was not authorized by law.

(*This is a repetition of a former demurrer.*)

Eighteenth—That the statute of limitations is a bar to a recovery in this case.

(*This action being to recover the value of the bonds issued prior to July 1, 1872, the then sixteen years statute of limitation would apply; and the bill shows that an honest effort has been continually made since the bonds were delivered in December, 1870, to recover upon them, wherefore the claims cannot be treated as stale.*)

The foregoing demurrer appears on pages 39 to 51, both inclusive, of the record.

An extraordinary number—eighteen—grounds of demurrer have been filed in this case, many of which are mere repetitions of former expressed grounds, and the

statements made are frequently misrepresentations of the allegations of the bill, so that it requires a more than ordinarily careful examination of the bill to avoid confusion; and, therefore, entails undue labor upon both counsel and the court. I do not charge that any misrepresentations were purposely made, but the demurrer shows on its face that it was hastily prepared and not revised with that care which a pleading of that nature demands. Appellants only ask that the allegations of the bill be clearly understood by the court, and that no false impression of its contents and purport be acquired from the loose statements made from it in the special ground of demurrer.

By agreement of counsel, the foregoing demurrers were submitted to the court below on printed briefs. *(Record, p. 53.)*

On May 4, 1885, the Circuit Court sustained the demurrer and dismissed the bill for want of equity, from which ruling appellants herein prayed an appeal to this court, and filed their bond, which was approved by the court. *(Record, pp. 54, 55 and 56.)*

Appellants assign the following errors:

First—The Circuit Court erred in sustaining said demurrer and dismissing appellants' bill.

Second—The Circuit Court erred in not overruling said demurrer.

Third—The Circuit Court erred in not overruling said demurrer, and ruling the defendants in said cause to answer the bill or enter a default for want of an answer, and granting the relief prayed for in the bill.

Fourth—The bill should have been dismissed, if dismissed at all, without prejudice to another suit. By the

action of the court below, parties in interest might be estopped from bringing an action at law, if that should be held the only proper remedy.

The following are the acts of the Legislature under which the election of June 5, 1869, was held and bonds issued:

AN ACT to authorize cities, towns or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes railroad.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all incorporated towns and cities and towns acting under the township organization law, which lie wholly or partly within 20 miles of the east line of this state, and also between the city of Chicago and the southern boundary of Lawrence county, be and the same are hereby severally authorized to appropriate such sum of money as they may deem proper to the Chicago, Danville and Vincennes railroad company, to aid in the construction of the road of said company, to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town or township respectively: *Provided, however*, that the proposition to oppropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns or cities, at a regular, annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by a ballot at the usual place of election; and if the majority of votes cast shall be in favor of the appropriation, then the same shall be made, otherwise not.

§ 2. The authorities of said townships, towns or cities respectively, are hereby authorized and required to levy and collect a tax, and make such provisions as may be necessary and proper for the prompt payment of the appropriation under the provisions of this law.

§ 3. *And be it further enacted*, That all the taxes heretofore voted in any and all the townships, towns or cities along the line of the aforesaid road, in aid of the construction of said road, are hereby legalized and declared valid.

§ 4. *And be it further enacted*, That any and all of said townships, towns or cities within the county of Iroquois and along said line of road as aforesaid, may vote for or against such taxes, conditioned, that the town of Watseka, in said county, shall be made a point on said road, and in case a sufficient amount of such conditioned taxes be voted in said Iroquois county to build the additional length of road required to make said town of Watseka a point in the same, then and in that case said road shall be so located as to run through or joining said town of Watseka.

§ 5. This act shall take effect and be in force from and after its passage.

APPROVED March 7, 1867.

AN ACT to enable towns, townships, cities or counties along the line of the Chicago, Danville and Vincennes Railroad to contribute toward the construction of said railroad.

SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the several counties through which the Chicago, Danville and Vincennes Railroad shall pass are hereby authorized, by action of the board of supervisors, or by action of the county court in counties not acting under township organization, to make appropriations, or loan the credit of such county or counties, in such sum or sums, and upon such terms and conditions, as they may deem proper, to extend and furnish aid to the Chicago, Danville and Vincennes Railroad Company in constructing the said railroad: *Provided*, that the question as to whether such county or counties shall make such appropriation, or loan the credit of such county, as hereinbefore stated, be first submitted to the legal voters of such county by said board of supervisors, or county court, as the case may be, at any regular or special election called for that purpose, twenty days' previous notice for which shall have been given, designating the amount proposed to be so contributed to said railroad, and a majority shall have voted for the same. The posting of said notices shall, in other respects, be regulated by the law now in force concerning the posting of notices for the election of county officers.

§ 2. The legal voters of any town, township or city along the line of said railroad, whether said railroad shall run into or through said town, township or city, or not, may, by a majority of

the legal voters voting at any election held for the purpose, make appropriations or donations to aid in the construction of said railroad; and the proper authorities shall levy and collect taxes, in the manner that other taxes are levied and collected, to promptly meet any obligations assumed under and by virtue of this act.

§ 3. Whenever any township shall desire to contribute toward the construction of said railroad, as provided in section two of this act, the vote may be taken at any regular or special meeting, and, if at any special town meeting, may be called as now provided by law for such meetings; and whenever the voters of any town or city shall desire to contribute toward the construction of said railroad, a special election may be held by the proper authorities of any such town or city, upon giving ten days' notice in any newspaper published in such town or city, or by posting up written or printed notices in four public places in said town or city, of the time, place and object of such election; or such appropriation may be voted at any regular election in such town or city. The votes at any election held in any incorporated town or city, for the object herein mentioned, shall be canvassed and returned as at any other election in said town or city; and in all cases the notices given shall specify particularly the amount to be voted for or against at such election, and in no case shall the appropriation exceed the amount specified in the notice or notices.

§ 4. The authorities of any township, town or city—such township, town or city having voted to contribute aid in the construction of said railroad—may borrow money to promptly meet such contribution, and issue bonds of such township, town or city, at a rate of interest not exceeding ten per centum per annum, payable annually or semi-annually, as they may deem best, and may negotiate the same on such terms as they may deem advisable, and may make the same payable at such place or places, and payable at such time or times, as they may deem for their best interests, and shall have power to levy and collect such taxes as may be necessary to pay accruing interest, or pay the principal sum.

§ 5. In all cases when any township, town or city shall have voted to contribute any aid, as hereinbefore provided, toward the construction of said railroad, the amount or amounts so voted shall become due and payable as soon as said railroad shall be completed into or opposite to any such township, town or city.

§ 6. The authorities of any such township, town or city may use and appropriate (of) the moneys hereinbefore provided to be raised for the purpose of procuring the right of way for said railroad company, for their railroad, in the county or counties where such township, town or city shall be situated, and may authorize the collection of money for such purpose as soon as said railroad line shall be permanently located.

§ 7. Whatever any township, town or city along the line of said railroad shall have heretofore done toward securing the right of way for said railroad, is hereby ratified and declared to be valid.

§ 8. All aids, contributions or appropriations heretofore voted or ordered in the counties of Cook, Will, Kankakee, Iroquois and Vermilion, either of townships, towns, cities or counties, are hereby ratified and confirmed, upon the terms or conditions by them, or each of them, so voted or ordered: *Provided*, that this section shall not apply to the townships of Butler, Georgetown and Ellwood, in the county of Vermilion, nor to the appropriation made by the county of Vermilion by its board of supervisors.

§ 9. This shall be a public act, and shall be in force from and after its passage.

Approved March 24, 1869.

Brief of the Argument.

I.

There was power in the town to create the debt and issue the bonds. The bonds, upon delivery to Joseph E. Young & Co., became their property, and were then, and have continued to be, a subsisting and valid obligation against the town, in favor of any persons entitled to them.

Chicago, Danville & Vincennes R. R. Co. et al. v. *Smith*, 62 Ill. 268.

Same v. *Coyer et al.*, 79 Ill. 373.

The people of the town having created the debt by their vote, the act of executing the evidences of the indebt-

edness was properly performed by the supervisor, as the executory officer of the town, especially after receiving directions so to do from the board of town auditors.

Town of Windsor v. *Hallett*, 97 Ill. 209.
Town of Prairie v. *Lloyd*, Ibid. 197.
Town of Walnut v. *Wade*, 103 U. S. 683.
Town of Douglas v. *Niantic Savings Bank*, 97 Ill. 229.

II.

By the assignments of Wm. D. Judson to E. G. Judson, and Amos Tenney to Willie Amos and Sutherland Tenney, a trust was created in these bonds for the use of the assignees, to the limit of their demands, and any overplus would revert to the assignors. John H. Stebbins, having acquired the interest of Joseph E. Young—the remaining member of the firm of Jos. E. Young & Co.—is entitled to that interest in a general distribution of the fund when once established.

2 Story's Equity, secs. 962, 1,044, 1,047 and 1,057, and cases cited thereunder.

III.

A court of chancery is the proper forum in which to enforce the rights of all the parties to this cause, to carry out the trust involved and afford a remedy for Stebbins, the equitable assignee of Young, to his interest.

Thomas v. *Morgan County*, 59 Ill. 479.
Same v. *Same*, 76 Ill. 120.
Morris v. *Cheney*, 51 Ill. 451.
2 Story's Equity, sec. 1,250.

A court of chancery has jurisdiction in an action upon a sealed instrument which has been lost or destroyed.

1 Story's Equity, secs. 81 to 84, inclusive, and authorities cited thereunder.

Patton v. *Campbell*, 70 Ill. 72.

By analogy an action in chancery will lie to recover upon lost negotiable instruments, as those in controversy, they being held and treated as bonds.

1 Story's Equity, secs. 85 to 87.

Fisher v. *Mershon*, 3 Bibb, 527.

Hansard v. *Robinson*, 7 B. & Cressw. 90.

Edwards on Bills, 295 to 300.

Story on Bills, secs. 348, 347 to 449.

Cooper Equity Pl., 126, 130, 239.

Hopkins v. *Adams*, 20 Vt. 407.

East India Co. v. *Boddan*, 9 Ves. 468–469.

Davis v. *Dodd*, 4 Price, 176.

Thomson on Bills, ch. 3, sec. 5, p. 323 (2d ed.)

Martin v. *Bank of U. S.*, 4 Wash. Cir. R. 253, 255.

Walmsley v. *Child*, 1 Ves., Sen 341.

1 Fonb. Eq. 17.

Ex parte Greenway, 6 Ves., Jr. 812.

Rowley v. *Ball*, 3 Cowan, 312.

Posey v. *Decatur Bank*, 12 Ala. 802.

In England only *non*-negotiable notes might be sued at law, when lost or destroyed; but negotiable notes lost or destroyed must be sued in equity.

Ramuz v. *Crowe*, 1 Exch. 167.

Crowe v. *Clay*, 9 Exch 604, reversing same case in 8 Exch.

Price v. *Price*, 16 M. & W. 232, 243.
Powell v. *Roach*, 6 Esp. 76.
Hansard v. *Robinson*, 7 B. & Cressw. 90.

If the lost note is payable to bearer, the remedy must be in chancery.

Lazell v. *Lazell*, 12 Vt. 443, citing:
Bayley on Bills, 413, 414, and notes.
Chitty on Bills, 293.
Rowley v. *Ball*, 3 Cowan R. 303.
Kirby v. *Sisson*, 2 Wend. R. 550.
Thomson on Bills, ch. 3, sec. 5, p. 323 (2d. ed.)

"The more general principle established in this "country seems to be, that whenever an assignee has an "equitable right or interest in a debt, then a court of "equity is the proper forum to enforce it."

2 Story's Eq., secs. 1,057a, 1,057b, 1,250
Townsend v. *Carpenter*, 11 Ohio (Stanton) 21.
McCall v. *Harrison*, 1 Brock, C. C. R. 126.
Buck v. *Swasey*, 35 Me. 52.
Taylor v. *Reese*, 44 Miss. 89.
Riddle v. *Mandeville*, 5 Cranch, 322.

Courts of equity, in cases of fraud, have concurrent jurisdiction with courts of law.

Jones v. *Neely*, 72 Ill. 449.

IV.

This suit being to recover on instruments in writing, duly signed and delivered in December, 1870, maturing from 1871 to 1878, and fraudulently seized and destroyed by the defendant town in 1876, while they were in the hands of the court, the only statute of limita-

tions that could apply would be by the sixteen-year statute in force when the bonds were executed and delivered.

Means et al. v. *Harrison, Exr., etc.*, June Term, 1885, Supreme Court of Illinois; Legal News, July 11, 1885, page 366.

Dickson v. *C., B. & Q. R. R. Co.*, 77 Ill. 331.

Hyman v. *Bayne*, 83 Ill. 256.

The statute of limitations does not apply to cases in equity, especially where the party setting up the statute in bar has been guilty of fraud.

Greenman et al. v. *Greenman*, 107 Ill. 411.

V.

There is no misjoinder of parties complainant. Each complainant is a substantial party, each having an interest in the result, and no decree could be entered without each being in the case. John H. Stebbins succeeds to the interest of Joseph E. Young. Edward G. Judson succeeds to so much of Wm. D. Judson's interest as will satisfy his debt, and the balance reverts to Wm. Judson. The same relation exists between Amos Tenney and Willie Amos and Sutherland Tenney.

Russell v *Clark's Exrs.*, 7 Cranch, 69.

Osborne v. *Bank of U. S.*, 9 Wheat. 738.

Continuous efforts having been made since 1870 to recover on these bonds, much if not all the delay having

been caused by the fraud of the town of St. Anne, laches cannot be imputed.

Johnson v. *Diversy*, 82 Ill. 446.

Pacific R. R. Co. of Mo. v. *Missouri Pacific Ry.* 111 U. S. 519.

Greenman et al. v. *Greenman*, 107 Ill. 411.

Argument.

May it Please the Court:

As I understand them, the eighteen special grounds of demurrer filed in this case raise only four points, to wit: First, misjoinder of parties; second, statute of limitations a bar to the suit; third, invalidity of the bonds in controversy, because of alleged irregularities in issuing the same; and, fourth, that appellants' remedy is at law and not in chancery.

This court has decided that a large number of special pleas in an action at law, where the issues could be raised by a very few pleas, was a reprehensible practice and not to be tolerated.

1.

No misjoinder.

That there is no misjoinder of parties in this suit, only a careful reading of the bill is necessary to show. A familiar rule of pleading is, that all persons having a direct or remote, but substantial, interest in or to the property in controversy, in a suit in chancery, must be made parties, either complainant or defendant; so that when the court obtains jurisdiction of the subject matter, it may be able to adjust the rights of all persons in interest and do complete justice without a multiplicity of suits. And if

a court of chancery acquires jurisdiction in a cause for one purpose, it will assume jurisdiction for all purposes necessary to settle legal difficulties and put an end to litigation.

Applying the rule to this case, we find, from the allegations of the bill, that Joseph E. Young & Co. (composed of Joseph E. Young, Amos Tenney and Wm. D. Judson) became the absolute owners of the bonds in question, on December 27, 1870, under that firm's contract with the railroad company for building the road, by delivery thereof to them by the supervisor of the town. No subsequent act of the town or its officers could divest them of their legal ownership to, or rights in, the bonds. The re-delivery of the bonds by Young & Co. to the supervisor, for the purpose of having that officer make his affidavit under the act of April 16, 1869, and having the same registered in the office of the State Auditor, was an affair between Young & Co. and the supervisor—the act entailing upon the owner of such bonds the duty of having them registered

Pending the various litigations which have been going on to recover these bonds, the entire interest of Joseph E. Young to his one-third interest passed to John H. Stebbins, through a receiver's sale in the State Court, and a sale by the same person as assignee in bankruptcy in the Federal court.

The interest of Amos Tenney passed to Willie Amos and Sutherland Tenney, in trust to secure a debt owing by the former to the latter, less any excess over and above amount due, which excess would revert to Amos Tenney. And, by assignment, Wm. D. Judson's interests passed to Edward G. Judson to extent of a debt due from William to Edward, the excess to revert to William.

From this statement—which corresponds with the allegations of the bill—Stebbins, Edward G. Judson, William D. Judson, Willie Amos, Sutherland and Amos Tenney, are all substantially interested, as complainants, in the result of the suit, and no decree could have been entered unless all had been made parties.

Russell v. *Clark's Ex'rs*, 7 Cranch, 69.
Osborne v. *Bank*, 9 Wheat. 738.

2.

STATUTE OF LIMITATIONS.

In the brief an authority is cited to the effect, that in chancery the statute of limitations cannot be set up by a defendant, where the lapse of time was caused by the fraudulent conduct of the party relying on the statute. Whether that doctrine will apply to this case is not a matter of moment, because, following the strict rules of law, the bonds in controversy are not barred by any statute in existence at the time they were issued. On December 27, 1870, the statute applicable to these bonds made sixteen years the limitation in time in which instruments in writing might be sued on after maturity. On July 1, 1872, a new law went into force in Illinois, making ten years the limit. But our Supreme Court has decided that the latter act could not operate to affect instruments made prior to its passage. The latest and most comprehensive decision on that question appears in the case of *Means et al.* v. *Harrison*, at the June Term, 1885. The head-notes of the case may be found in the Chicago Legal News of July 11, 1885, at page 366. The language of the head-note is:

"The limitation act, April 4, 1872, which took effect "July 1, 1872, has no application to a promissory note

"given by one in January, 1872, payable two years after "the date thereof. The limitation law of sixteen years "applies to such a note."

The court had before passed on the same question in *Dickson* v. *C., B. & Q. R. R. Co.*, 77 Ill., and *Hyman* v. *Bayne*, 83 Ill. 256.

Nor can the demand made in this suit be characterized as a "stale claim." For the purpose of showing the contrary, the bill sets forth, in detail, the persistent efforts put forth to recover the bonds, or their value; and while some of the efforts may have been as unwise as they proved to be futile, still the bill discloses an honest endeavor to recover on the bonds. The cases of *Johnson* v. *Diversy*, 82 Ill. 446, *Pacific R. R. cases*, 111 U. S., 519, and *Greenman et al.* v. *Greenman*, 107 Ill. 411, are in harmony with this view.

3.

BONDS NOT INVALID.

By one or more grounds of special demurrer, the bonds are alleged to be invalid.

In my brief I have only attempted to show, first, that the Supreme Court of Illinois has recognized the power of municipalities on the line of the C., D. & V. R. R. to donate aid to the same, under the act of March 7, 1867, printed in full herein, as enunciated in the opinion in case *C., D. & V. R. R. Co.* v. *Smith*, 62 Ill. 268. Second, that under the act of March 24, 1869, printed herein, further power was given to issue bonds to pay any donation voted. Third, that by the vote of June 5, 1869, *a debt was created* and the character of that debt fixed—to-wit, in *bonds*, by the people of St. Anne. Fourth, that by the act of the officers of that town, constituting

the board empowered to pass upon and allow claims against the town, and the act of the supervisors in executing and delivering the bonds, the debt, which had been legally created, was legally consummated, and no subsequent act of the town, or its officers, never so fraudulent, could retract what had been done, the road having been constructed according to contract, and the beneficiaries of the bonds having come in possession of the same.

I have elected to rely on the decision of the Supreme Court of Illinois in the case of *C., D. & V. R. R. Co.* v. *Coyer et al.*, 79 Ill. 373, wherein the regularity of the proceedings under which the bonds were issued were held valid, and upon the decisions in *The Town of Windsor* v. *Niantic Savings Bank*, 97 Ill. 229; *Town of Windsor* v. *Hallett*, 97 Ill. 209; *Town of Prairie* v. *Lloyd*, Ibid. 197; and *Town of Walnut* v. *Wade*, 103 U. S. 683, as to the execution of the bonds. If these opinions enunciate correct principles of law, the validity of the bonds can never be successfully attacked.

In this suit no importance can be attached to the case of *C., D. & V. R. R. Co.* v. *The Town of St. Anne et al.*, 101 Ill. 151. The sole object of that suit was to enforce the execution and delivery of the bonds of the town, by a proceeding in *chancery*, in the name of the railroad company. The case was decided long after the Coyer suit, *supra*, and beyond holding that the proper action was *mandamus* and not a suit in *chancery*, the opinion is mere *dicta* and not called for by the record.

Ignorance of facts, no doubt, led complainants in that suit into the blunder, and made it possible for the Illinois Supreme Court to render the opinion it did in the 101 Ill. 151, *supra*. But if the bill herein discloses an

equitable interest in and to the proceeds of the bonds in question in appellants, then the proceedings in that case cannot affect them; and especially is this position made impregnable by prior events, if the court takes into consideration the methods employed by this appellee town to defeat the payment of its obligations. By the allegations of the bill, the relations between the town and the railroad company and its contractors were perfectly harmonious up to December 27, 1870, when the road had been constructed and the bonds delivered. After that was concocted and carried into effect a conspiracy, culminating in the destruction of the bonds, which ought to have consigned each and every of the participants in the same to the penitentiary. (Stat. of Ill., Criminal Code, chap. 38, § 46.) First, resort was had to the courts in *Coyer* v. *C., D. & V. R. R. Co.*, 79 Ill. 373. The Supreme Court holding the bonds valid in that case, the officers of the town, acting under the advice of learned counsel, employed force and fraud to accomplish their purpose.

I am not claiming this as an argument to sustain the validity of the bonds in controversy, but to rebut any presumption that the rulings in *C., D. & V. R. R. Co.* v. *St. Anne*, 101 Ill. 151, are conclusive in this case

Counsel, by their 7th demurrer, endeavor to draw a distinction between *donations* to railroad companies and *subscriptions* to stock of railroads by municipal corporations, under the Constitution of 1870. That distinction was once held by this court, in *Portsmouth Savings Bank* v. *Concord*, 2 Otto, 626, but the Illinois Supreme Court had already repudiated such construction in *C. & Iowa R. R. Co.* v. *Pinckney, et al.* 74 Ill. 277, holding that no such distinction could be reasonably made, and this latter ruling has been adopted by this court, thus overruling its decision in

Savings Bank v. *Concord*. See *Louisville* v. *Savings Bank*, 104 U. S. 471, *Fairfield* v. *Gallatin County*, 100 U. S. 47.

Questions relating to the validity or invalidity of municipal bonds have been so frequently before this court, that it would seem to be a work of supererogation to further argue or cite authorities in support of the validity of these bonds.

4.

REMEDY.

As to what should be the remedy upon a lost or destroyed negotiable instrument, has been a subject of discussion among courts and lawyers for a great many years, in this country and in England, and probably as great a diversity of opinions has been given as upon any other question which has come before the courts.

Divested of every other element except the one of the loss or destruction of the instrument sued on, some courts have held that the action ought to be at law; others, that it should be a suit in chancery; while others hold that the remedies are concurrent, and either can be maintained. This diversity of opinion, however, is largely limited to the American courts. The English courts have almost uniformly held that equity is the only adequate remedy.

Under the practice of this court, which follows the practice of the English High Court of Chancery, except as the practice of that court may be modified by acts of Congress, or its own rulings, I have assumed that English authorities bearing upon the question would be regarded with consideration, and especially so when such authorities are supported by the views of elementary writers upon the same subject.

Other elements enter into the case at bar which would seem to give a court of equity jurisdiction, in States like

Illinois, where the English system of practice holds, irrespective of that of the loss or destruction of the instruments. As between the Judsons and Tenneys there are trusts to be enforced and adjustments of account to be made—rights which equity alone can settle. Stebbins' interest was acquired in such a manner that it isdifficult to see how he could realize such interest by any proceeding at law. The notoriously reprehensible conduct of the town authorities in seizing and destroying the bonds, alleged in the bill, and for purpose of this demurrer, must be taken as true, although if it should turn out that the bonds were not, in fact, destroyed, a question would arise as between the town and these claimants, as to whether the bonds were not in the hands of other and innocent holders, in which case the town could exact indemnity from the complainants herein as a condition precedent to payment to them, might also be an element calling upon the equity side of the court for redress.

The parties suing in this case are equitable assignees of debts, choses in action, occupying the position alluded to by Judge Story in his work on Equity,—Vol. 2, § 1057a — where he says "the more general principle "established in this country seems to be, that whenever "an assignee has an equitable right or interest in a debt, "or other property (as the assignee of a debt certainly "has), there a court of equity is the proper forum to en- "force it; and he is not to be driven to any circuity by "instituting a suit at law in the name of the person who "is possessed of the legal title "

In section 1250, he says: "If a trust is created for "the benefit of a party, who is to be the ultimate receiver "of the money, or other thing, which constitutes the sub- "ject matter of the trust, he may sustain a suit in equity

" to have the money, or other thing, directly paid or de-
" livered to himself; for, in such case, he is entitled to dis-
" pose of it as the absolute owner."

The assignments made by William D. Judson and Amos Tenney, transferred their respective equitable interests in the bonds, *pro tanto*, to the assignees therein named. Applying the rule laid down in *Riddle & Co.* v. *Mandeville et al.*, 5 Cranch, 322, these assignees were not bound to look to their assignors, but had their remedy direct in chancery, against the town as ultimately liable; and the same reasoning would apply, but with more force, as to Stebbins' interest, for the reason that Young, through whom he acquired title, is insolvent, and no action would lie against him.

To the same effect are *Taylor* v. *Reese*, 44 Miss., 89; *Townsend* v. *Carpenter*, 11 Ohio (Stanton), 21; *Buck* v. *Swazey*, 35 Me., 52; and *McCall* v. *Harrison*, 1 Brock, C. C. R. 126.

Again, it has been laid down as a rule of practice, that the remedy to recover on a lost note, payable to bearer, like those in controversy, must be in equity.

In *Lazell* v. *Lazell*, 12 Vt. 449, the court says: " If " the note or bill is payable to A. B. or bearer, or to the " bearer, and is lost, the remedy must also, probably, be " in chancery, since the legal title to such paper passes by " delivery," and refers to various authorities in support.

" Under the English common law as it existed prior " to the statute 17 and 18 Vict. C. 125, referred to in the " last section, where a negotiable instrument was lost, the " loser had no remedy either in an action on the bill or " in an action for the consideration given for it, though he " had a remedy in *equity* on finding security.

Thompson on Bills, 207.

"But, in general, no *action at law* can be supported "against a party to a bill of exchange, note or check, in- "dorsed in blank, so as to be transferable to a *bona-fide* "holder, and even in halves, and lost *before or on the day* "*that it is due*, although a bond of indemnity has been "tendered to the defendant; and if the bill be transfera- "ble by endorsement, and is endorsed in blank, or trans- "ferable by delivery, it should seem that, even if it were "lost *after it became due*, and even after action brought, the "same rule prevails; nor is the defendant liable to be sued "on the consideration of the bill, and even an express "promise, without any new consideration, cannot be en- "forced at law."

Chitty on Bills, *265;

where the author makes copious citations to the authorities to sustain the doctrine of the text. Subsequently the writer says that where the bill has been destroyed, an action at law *may* lie; by no means, however, excluding the other proposition, that equity is a proper remedy.

Rowley v. *Ball*, 3 Cowan, 303, and *Kirby* v. *Sisson*, 2 Wend. 550, are pertinent.

Story, in his work on Bills (4th ed.), sec. 348, lays down the rule that, in case of refusal to pay a lost bill by an acceptor, the only proper remedy is in equity; and, in further treating the subject, in sections 447, 448 and 449, he extends the rule to drawers of bills, and, while recognizing the conflict of authorities in America, says that the English doctrine—that equity is the only proper forum, as, being based on the most potent reasons,—is difficult of being overturned.

Parsons, in his work on Notes and Bills, vol. 2, pages 296 and 297, in discussing the remedy on lost notes, says: "In England it is clearly settled—and, indeed, there was "never any authoritative case at law to the contrary—that "a lost bill or note payable to bearer cannot be sued at "law. And this is now equally true, whether the note be "payable to bearer or order, and even though the loss "occurred after it fell due, and even though indemnity be "offered at law.

"And equity is everywhere admitted to have juris- "diction of lost instruments, even in those States where a "concurrent power is invested in law. In this country, "courts of equity alone can furnish relief upon negotiable "notes and bills lost before maturity, in most of the States "in which law and equity are accurately distinguished, "and where a court exists having full equity powers."

In *Fisher* v. *Mershon*, 3 Bibb, 527, the suit was in equity on a *destroyed* note, not fraudulent nor through any fault of the holder, and the court said: "Had Mershon, "by his own voluntary act, destroyed the note, it would "be admitted equity ought not to grant relief; but to "require of him to show he was clear of all possible neg- "ligence in permitting the child to gain the possession of "the note, would be recognizing the existence of a rule "unfounded in principle and not supported by precedent, "and which would in its consequences defeat the juris- "diction of courts of chancery in almost every case relat- "ing to lost writings. We are of the opinion, therefore, "the circumstances of the destruction of the bill are suf- "ficient to authorize a court of chancery to take jurisdic- "tion of the cause."

The court, in *Posey* v. *Decatur Bank*, 12 Ala. 818, says: "It was for a long time an unsettled question in

"England whether a suit at law could be maintained on a "lost note, or bill, that could be passed from hand to "hand by delivery and on which any holder might sue. "But in the case of *Hansard* v. *Robinson*, 7 B. and C. "Rep. 20, Lord Tenterden, after a thorough examina- "tion of the question, determined against the right to "sue at law, and from that time the question seems to be "settled in England, and the decision in this case has "been adopted by the text writers as unexceptional. "[See Chitty on Bills, 297; Story on Bills—.] And these "authorities say it is not material whether the bill was "due or not at the time of the loss. The same question "arose in 3 Cowan, 303, and the same rule was main "tained and the court say that a suit at law cannot be "maintained on a lost note that is transferable by deliv- "ery, and that the only remedy is in equity, and the rule "is the same whether lost before or after due.

"Mr. Greenleaf, in his treatise on Evidence, vol. "2, 131, adopts the same rule. I have looked into the "authorities with some wish to find the rule established "to the contrary, but I think I am forced to pronounce, "from the weight of authorities, both in England and the "United States, that a suit cannot be maintained at law "on a lost bill or note that will pass by delivery, whether "lost before or after due."

The case of *Hansard* v. *Robinson*, 7 B. & C. p. 90, was an action at law by the endorsee of a bill of exchange against the acceptor, the bill having been lost and payment refused, because the bill was not produced and surrendered. The court held the plaintiff could not recover unless he produced the bill, and directed a non-suit; but ruled that the plaintiff might move to enter a verdict for the amount of the bill. After this motion was fully

argued, the court discharged the rule, thus sustaining its first ruling. Among other things, Lord Tenterden, in his opinion, holds that under the rules of the law merchant, the holder of a bill must present the same to the person liable, when due, and surrender the same on payment. The possession of the instrument operates as the best and only secure voucher for the party paying, and a non-production of the bill or note is a sufficient excuse for refusing payment. "As far as regards his voucher and discharge towards the drawer, it will be the same thing "whether the instrument has been *destroyed* or mislaid." After showing the difficulties in the way of realizing on such instruments, the court proceeds: "Is the holder, "then, without a remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and, if it be refused, he may enforce payment therefor in a court of "equity, and this is agreeable to the mercantile law of "other countries."

By other authorities, cited in my brief, it has been held that where the destruction occurred by the wrongful act of the person liable, no bond of indemnity could or would be exacted.

In *Hopkins* v. *Adams et al*, 20 Vt. 408, the action was in chancery, on a lost negotiable note, and the decree was for the relief prayed, on giving an indemnifying bond to defendants On appeal to the Supreme Court, it was held that the suit was properly instituted in chancery; but inasmuch as the statute of limitations was a bar to another recovery on the lost note, no indemnity ought to have been exacted by the court below.

As to concurrent jurisdiction of courts of equity with courts of law, the court said, in *Davies* v. *Dodd*, 4 Price, 179: "It does not become me to say whether the plaintiff

" has or has not any remedy at law ; but even though he " should have such a remedy, he has also a remedy here, " and if he had commenced an action at law, the defend- " ant might have restrained him by injunction from pro- " ceeding, and for this obvious reason : because a court of " law could not compel him to give security which a court " of equity would hold that he was entitled to. And there " are many cases of this nature, particularly where bonds " have been lost, where the parties have come into equity " on that ground ; and the case of a negotiable bill is still " stronger ; therefore I am of opinion this suit is proper."

The suit was on a lost bill of exchange.

The principles announced in *Hansard* v. *Robinson*, 7 B. & C., have been affirmed in *Crowe* v. *Clay*, 9 Exch. 605, *Ramuz* v. *Crowe*, 1 Exch. 170, and other authorities cited in the brief.

Regarding the antiquity of jurisdiction of courts of equity in cases of lost instruments, and the reasons assigned for giving that branch of the courts original jurisdiction, the opinion of Lord Chancellor ELDON, in *East India Co.* v. *Boddam*, 9 Vesey, Jr. 465, is full, and from the authorities cited in the notes to that case, it is shown that chancery jurisdiction is not lost, because courts of law now entertain jurisdiction over lost instruments in special cases.

The case of *Walmsley* v. *Child*, 1 Ves. Sen. 341, is more difficult to be understood, but the conclusions therein arrived at harmonize generally with the other authorities cited.

Questions very similar to those in controversy have been before the Supreme Court of Illinois.

Recurring again to the allegations in the bill in this case, it is seen that the Town of St. Anne, by its vote of

June 5, 1869, under the acts of March 7, 1867, and March 24, 1869, granted an absolute donation of $30,000 to the Chicago, Danville & Vincennes Railroad Company, and directed bonds to be issued therefor, conditioned only upon the construction of the road within fixed limits through the town. That J. E. Young & Co. had a contract to build the road, and in part payment therefor were to receive this donation. That by December 1, 1870, the road was built as desired by the town, and that the town board of auditors passed upon the conditions precedent and instructed the supervisor of the town to execute and deliver the bonds, which was done December 27, 1870. That after coming into possession of the bonds, Young & Co., the real owners, under their contract with the railroad company, that firm re-delivered the bonds to the supervisor, for purpose of having him make the required affidavit, under the act of April 16, 1869, and register the bonds in the office of the State Auditor.

That while thus in the control of the supervisor, but as the property of Young & Co., the suit of *Coyer et al.* was instituted, and the surrender of the bonds to Young & Co. or the railroad company restrained until that case was decided in favor of the owners of the bonds in 1876. *Coyer et al.* v. *C., D. & V. R. R. Co. et al.*, 79 Ill. 373.

That immediately on the dissolution of the injunction in the Circuit Court of Kankakee County, after the case was remanded by the Supreme Court, the replevin proceedings took place and the bonds destroyed by the officers of the town before the cause was heard before the justice of the peace issuing the replevin writ. In this suit the remote assignees of the railway company sue to recover on these destroyed bonds.

Relatively the facts and the legal status of the parties

to this suit are identical with the facts and parties to the suit of *Morgan County et al.* v. *Thomas et al.*, 76 Ill. 138, excepting the criminal conduct on the part of the town officers of the town of St. Anne and others participating in the destruction of the bonds in question, does not attach in the Morgan county case.

In that case, Morgan County voted a subscription to the Illinois River Railroad Company, conditioned on the road being constructed through Morgan County. The bonds were executed and placed in escrow with Elliott & Brown, bankers, to be delivered when the road should be built into Morgan County. Allen & McGrady, as contractors for building the road and creditors of the same, had received orders from the railroad company for a part of these bonds, and they, in turn, assigned over to Thomas their interest in bonds which were still undelivered, and in the hands of the bankers—Elliott & Brown. Subsequently the road was extended into Morgan County, but the bonds had been canceled. The suit was in chancery, and one of the questions was, had William Thomas a right to recover from the county the value of the bonds covered by the orders from the railroad company to Allen & McGrady, its creditors and contractors, and by them assigned to William Thomas; and the court held that the bonds were equitable assets of the railroad company, liable to be used by it in payment of its debts, and transfers or assignments thereof would carry the equitable title, and that the remote assignee could recover in equity.

Only a full examination of the several cases of *Morgan Co. et al.* v. *Thomas et al.* 76 Ill. 139; *Thomas* v. *Morgan Co.*, 59 Ill. 479, and *Thomas* v. *Morgan Co.*, 39 Ill. 496, in the latter two of which much of the history of the litigation is found, will enable the court to com-

pletely appreciate the comparison; and I beg the court's attention to these cases, as also to the case of *Morris* v. *Cheney*, 51 Ill. 451.

Relying upon the manifest rights of appellants under the authorities cited, the case is submitted.

THOMAS S. McCLELLAND,

Counsel for Appellants.